93 - 584

No. _____

Supreme Court, U.S.
FILED
OCT 15 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

S.J.T. INC., d/b/a T J SMILES,
and JAMES FENIMORE,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA,
and CHARLES WEBSTER, SHERIFF,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

JOHN P. BATSON
303 Tenth Street
Augusta, Georgia 30901
(706) 722-8191
Counsel for Petitioners

Please serve:

JOHN P. BATSON
Attorney for Petitioners
303 Tenth Street
Augusta, Georgia 30901
Telephone: (706) 722-8191

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether in Georgia, which has not constitutionally prohibited the sale of alcohol where nude dancing is performed, due process or equal protection is violated by an ordinance which bans nude dancing at establishments when and if twenty (20) per cent or more of an establishment's gross annual income is from the sale of alcohol, where the State has interpreted "gross annual income" to be the "current income stream."

2. Whether the ordinance is in violation of the First Amendment if it attacks the alleged secondary effects of the combination of nude dancing and alcohol, not by place centralizing or dispersing non-mainstream nude dancing establishments, but by outright banning the content of "non-mainstream" nude dancing in bars where the stream of income from alcohol sales is twenty (20) per cent or more.

3. Whether the ordinance is content neutral after the amendment.

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the courts of the State of Georgia were:

James Fenimore

S.J.T., Inc.

T J Smiles

Richmond County

Charles Webster

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION AND JURISDICTION 1

OPINIONS BELOW 1

CONSTITUTIONAL AND OTHER PROVISIONS 2

STATEMENT OF THE CASE AND FEDERAL ISSUES PRESENTED 4

THE QUESTIONS ARE SUBSTANTIAL 13

CONCLUSION 20

INDEX TO APPENDIX i

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Avalon Cinema Corporation v. Thompson, 667 F.2d 659 (1981) 18

Barnes v. Glen Theatre, Inc., 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 4, 17

California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972) 17

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) ..... *passim*

Construction Laborers v. Curry, 371 U.S. 542, 548-52 (1963) 1

Discotheque, Inc. d/b/a Discotheque Lounge, et al. v. City Council of Augusta, et al., Ga. Sup. Ct. No. S92M0525 (Order, Feb. 12, 1992) 5

Ebel v. City of Corona, 767 F.2d 635 (1985) 18

11126 Baltimore Boulevard, Inc., v. Prince George's County of Maryland, et al., 684 F.Supp. 884 (D.Md. 1988) 13, 18

Forsyth County, Georgia v. The Nationalist Movement, ___ U.S. ___, 112 S.Ct. 2395, ___ L.Ed.2d ___ (1992) 18

Gravely v. Bacon, 263 Ga. 203, 429 S.E.2d 663 (1993) 8, 9, 19

Harris v. Entertainment Systems, 259 Ga. 701, 386 S.E.2d 140 (1989) 4, 11, 17

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250 (1982) 8, 21

People Tags, Inc., et al., v. Jackson County Legislature, et al., 636 F.Supp. 1345 (W.D.Mo. 1986) 18

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 701 S.Ct. 2176, 68 L.Ed.2d 671 (1981) 17

S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia, 263 Ga. 267, 430 S.E.2d 726 (1993) .... *passim*

S.J.T., Inc. d/b/a T J Smiles and James Fenimore v. Richmond County, Georgia and Sheriff Charles Webster, No. 92-RCCV-910 (Rich. Co. Superior Ct. Order Dec. 4, 1992) 1, 2

Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) 15

Tollis, Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987) 17

U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) 15

Village of Schaumburg v. Citizens, etc., 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) 14

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) 14

OTHER AUTHORITIES

O.C.G.A. § 9-4-1 et seq. 1, 7

U.S. Const. amend. I. ..... *passim*

U.S. Const. amend. XIV ..... *passim*

INTRODUCTION AND JURISDICTION

This appeal challenges the facial constitutionality of a nude dancing and alcohol-sale ordinance from Richmond County, Georgia, banning nude dancing at any non-mainstream establishment whenever its "income stream" reflects that twenty (20) percent or more of the establishment's income is from the sale of alcohol.

The judgment appealed is from the Supreme Court of Georgia, decided June 14, 1993. *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993). (App. 1). A motion for rehearing was timely filed, and subsequently denied by the Georgia Supreme Court on July 15, 1993. (App. 16). A timely notice of appeal to this Court was filed with the Georgia Supreme Court on October 8, 1993. (App. 85).

The appeal is being docketed on October 12, 1993, within 90 days of the date of the denial of the rehearing.

Jurisdiction is based on 28 U.S.C. § 1257(2). This is an appeal from a declaratory action begun pursuant to O.C.G.A. § 9-4-1, *et seq.*, and pursued in this Court to avoid a multiplicity of litigation and the attendant unnecessary taking of fundamental rights where a substantial question of law exists. *See also*, 28 U.S.C. § 2201; *Construction Laborers v. Curry*, 371 U.S. 542, 548-52 (1963); (App. 42-84).

OPINIONS BELOW

The judgment appealed is *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726

(1993) (App. 1). The trial court order appealed is *S.J.T., Inc. d/b/a T J Smiles and James Fenimore v. Richmond County, Georgia and Sheriff Charles Webster,* No. 92-RCCV-910 (Richmond Co. Superior Ct., Dec. 4, 1992). (App. 11).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V (1791)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State of Georgia Constitution

Art. 1, § 1

Paragraph I. Life, Liberty, and Property.

No person shall be deprived of life, liberty, or property except by due process of law.

Paragraph II. Protection to person and property; equal protection.

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

Paragraph V. Freedom of speech and of the press guaranteed.

No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

Paragraph VII. Citizens, protection of.

All citizens of the United States, residents in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full employment of the rights, privileges, and immunities due to such citizenship.

Art. 1, § 2

Paragraph V. What acts Void.

Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.

STATEMENT OF THE CASE AND FEDERAL ISSUES PRESENTED

In 1989 the Georgia Supreme Court established that "nude dancing is a form of expression protected by the free speech guarantees of the constitutions of the United States and the State of Georgia. *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989). See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)." *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 268, 430 S.E.2d 726, 728 (1993). (App. 2 & 3). There was, and is, no statewide ban or limitation on non-obscene nude dancing and alcohol consumption at the same establishment. Appellants' business was the first such business in Richmond County,

although there were such clubs[1] longstanding inside the City of Augusta.[2]

Based on these circumstances the Appellants bought a lounge and the associated hotel, bordered by a swamp, another hotel, a used car lot and a four-lane highway, and began the business preparations to open a nightclub to sell liquor and present nude dancers for adults. (Complaint, App. 17-42). Appellants acquired a provisional liquor license in July, 1991 (App. 20) and had all necessary licenses by mid-1992, which placed no limit on presenting nude dancing in combination with the sale of alcohol. Even before they opened to sell alcohol, their intentions to have nude dancing were clear and known. (App. 21 & 22). In August, 1991, a Deputy confronted

---

[1] The nude dancing ordinance of the City of Augusta and the Richmond County ordinance are "substantially identical." (Allegations of Complaint ¶ 21, App. 23 admitted in Answer ¶ 21). There is a distinction between the City and County Ordinance which is not material herein: The City's ordinance Section 3 2(2)(b) covered "touching," but the County's ordinance omits that term.

The City of Augusta ordinance was appealed to the *Georgia Supreme Court in Discotheque, Inc., d/b/a Discotheque Lounge, et al. v. City Council of Augusta, et al.*, S92M0525 (Order, February 12, 1992) in which the Georgia Supreme Court granted a supersedeas prohibiting enforcement of the ordinance. This case was not pursued on appeal and is back before the Richmond County Superior Court.

[2] The City of Augusta is 50.9 square kilometers and Richmond County is 839 square kilometers. As of the 1990 census, the population of Augusta was 44,639, and the County was 189,719. 1993 County and City Extra, Annual Metro County and City Data Book (1993).

Appellant Fenimore, stating that if Appellants had nude dancing, the County would shut them down. (App. 22).

In September of 1991, the County passed an ordinance banning nude dancing. (App. 35-38). In September, 1992 the Defendant County passed the amended ordinance[3] which allowed nude dancing in "any mainstream performance house, museum or theater which derives less than twenty (20) percent of its gross annual income from the sale of alcohol beverages." (App. 40).

Appellants filed a complaint alleging the ordinance violated the First, Fifth and Fourteenth Amendments. (App. 17-34). Appellants sought injunctive and declaratory relief (App. 26; 33) from enforcement of the Richmond County nude dancing ordinance permanently, or pending litigation, challenging its facial constitutionality, and the manner of its implementation.[4]

---

[3] As referred to herein "the ordinance" is a combination of the original ordinance, Richmond County, Georgia Ordinance 91-15 (App. 35-38) and a 1992 amendment, Richmond County, Georgia Ordinance 92-5, effective September 1, 1992. (App. 38-41). Ordinance 91-15 is a general no nude dancing ordinance where alcohol is sold, which was amended by Ordinance 92-5, to allow nudity in establishments which serve alcohol, provided the establishment is a "mainstream performance house, museum, or theater which derives less than twenty (20) percent of its gross annual income from the sale of alcoholic beverages." (App. 36 to 37, Section 1; "hereafter Section 2," as it replaces Section 2 of 91-15 (App. 39)).

[4] Section 2(3), Ordinance 92-5, the ordinance's "mainstream" test based on the "yearly gross income," would seem to give any establishment a year to dance nude and determine whether it meets the test, even if nothing else is sure about the ordinance. (App. 40). Appellant feared the ordinance would,

The complaint challenged the key terms challenged herein, that is "any mainstream performance houses, museums, theaters which derives (sic) less than twenty (20) percent of its gross annual income from the sale of alcohol beverages." (App. 24; Complaint ¶ 24); see, O.C.G.A. § 9-4-1 (declaratory judgments). Appellants challenged the application of the ordinance as repugnant to the licenses they had already purchased. (Complaint; App. 17). A motion for temporary injunctive relief was simultaneously filed with the complaint. After two

---

regardless of the 1992 mainstream provisions, be read to ban any nude dancing. (Complaint; App. 17-34).

The Respondents continue to believe the ordinance has a subjective component, even after the Georgia Supreme Court's ruling in *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993). When on September 9, 1993, the Georgia Supreme Court lifted a supersedeas from February, 1993 (App. 64), it was interpreted as also lifting a stay pending *certiorari* application, granted July 15, 1993. (App. 59).

The Respondents arrested a dancer and Appellant Fenimore for "allowing nude dancing at an establishment which holds an alcoholic beverage license" (App. 53), and began license revocation proceedings. (App. 56). Appellant filed, among other motions, a motion for reconsideration of the lifting of the stay (App. 42), which was granted (App. 85) and the prosecutions and license revocations stayed. (App. 42-86).

In Appellants' Complaint they alleged Defendants would read the ordinance to have a subjective component and believe they could ban any nude dancing (App. 25 & 26; ¶ 29), and in Appellants' briefs they raised this issue, asking for a declaration Appellants were entitled to by the ordinance's "mainstream" exception.

hearings on Appellants' motions for injunctive relief,[5] the trial court denied protection from enforcement of the ordinance.[6] The trial court, in conclusory language, found that the ordinance passed the "*Paramount* [*Pictures Corp. v. Busbee*, 250 Ga. 252, 256, 297 S.E.2d 250 (1982)] test to further an important government interest, the government interest is unrelated to speech, and the restriction of speech is no greater than is essential to further the government interest. (App. 13). The trial court concluded that the ordinance was so narrowly drawn "as to not unnecessarily infringe on protected speech." (App. 14). The Appellants appealed the order and amended order, entered December 4, 1992 by the trial court. (App. 11).

After Appellants herein had submitted their brief, the Georgia Supreme Court decided *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993). Gravely did "not deny that [the city's] interest in combating secondary effects of adult entertainment establishments is unrelated to the suppression of speech. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d (1986)." *Id.*

---

[5] The parties stipulated that the Appellants' motion was one for preliminary or interlocutory relief pending litigation. (Stipulation of Parties filed with Georgia Supreme Court).

The confusion arose because Appellants filed what was entitled "Motion for Temporary Injunction". The parties and court treated the motion as one for a preliminary or interlocutory injunction. Evidence was submitted by both parties and two hearings held. Unfortunately the trial court used the term "temporary" in its orders. (App. 11).

[6] The only difference between the first Order and the Amended Order (App. 11-15) is that the Amended Order contains the following: "8. Defendants intend to enforce the Ordinances described in Paragraph 7, above."

at 205. *Gravely* did not alter the constitutionality of selling alcohol where nude dancing is performed.

The Appellants herein challenged the Richmond County ordinance as seeking to suppress speech because the ordinance makes nude dancing illegal if and when the gross annual income from alcohol sales is twenty (20) percent or more. (Brief of Appellant, filed February 8, 1993 at 18 & 19). The Appellants challenged the ordinance on vagueness and overbreadth grounds (Brief of Appellant, filed February 8, 1993 at 19-25), as well as on grounds of lack of a rational basis. (Brief of Appellant, filed February 8, 1993 at 21-25).

After the Georgia Supreme Court issued its ruling, Appellants filed a motion for rehearing supported by a brief in which the First Amendment and the due process and equal protection grounds were raised. (Brief of Plaintiff in Support of Motion for Reconsideration, filed June 24, 1993).

The Ordinance – 1991 Ordinance and 1992 Ordinance

The County's ordinance is the combination of the original ordinance, 91-15, (App. 35-38) banning nude dancing at alcohol establishments, and the amended ordinance, 92-5, effective September 1, 1992. (App. 38-41) (hereafter ordinance). The Georgia Supreme Court concluded that the amendment of 91-15 by ordinance 92-5, by permitting nude dancing and alcohol in "mainstream" theatres and museums, sufficiently narrowed the reach of

the ordinance to "avoid the impact on modes of expression which are not implicated in the productions of negative secondary effects." *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993). (App. 4).

Section 1 – Secondary Effects Language

The preamble of ordinance 91-15, Section 1, sets out the perfunctory secondary effects language, based on *Renton v. Playtime Theaters, Inc, et al.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

There is no language in the ordinance, nor other proof that the ordinance's method of requiring a club to commerce in non-alcohol business rationally relates to the control of the stated secondary effects. There is nothing in the ordinance which ties gross income from alcohol revenues to secondary effects. No reference to such a study is made in the ordinance or record.

Section 2 – Prohibited and Permitted Nudity Defined

The ordinance has definitions of prohibited nudity. (App. 36 & 37). Section 2(1) prohibits naked sellers or servers of alcohol. (App. 36). Section 2(2) describes prohibited acts for entertainment. Section 2(3) prohibits patrons from doing the prohibited acts as part of a contest. (App. 36 & 37). More importantly here, it allows the otherwise prohibited acts in "mainstream" houses, as its means of not being too restrictive. (App. 38-41).

Section 2(3) – Mainstream versus Non-Mainstream and The 80% – 20% Income Comparison Nudity Benchmark

After nudity and prohibited acts are defined, the County's ordinance sets out which establishments providing alcohol can have nudity and which cannot. (Section 2(3)) (App. 38-41). The ordinance allows alcohol sales and nudity in those "mainstream"[7] establishments which derive less than twenty per cent (20%) of their gross annual income from alcohol beverages, (App. 40) but prohibits nudity in clubs where income from alcohol is 20% or more of the gross annual income. There is no definition of what transactions may, or may not, be considered in the "gross annual income" figure. However the Georgia Supreme Court in the face of Appellants' vagueness challenge made the following observation in text:

> Appellants' questions are capable of being answered by the application of common sense, accepted principles of accounting and the plethora of laws and regulations controlling the sale of alcohol. We hold, therefore, that the ordinance is sufficiently specific in its terms to permit appellants to conduct themselves so as to avoid that which is forbidden.

S.J.T., Inc. at 263 Ga. 270, 430 S.E.2d at 729 (App. 6). The Georgia Supreme Court then added a footnote in which it made the term "gross annual income" even more vague by saying that the determination of the 80%-20%

---

[7] *See Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140, 142 (Ga. 1989) ("mainstream performance houses and museums").

benchmark could be applied to the Appellants' "current income stream". (App. 6). The Court addressed the vagueness of the "gross annual income" in *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 270, 430 S.E.2d 726, 729 (1993) (App. 5). Appellants addressed this in their brief at 19-25, and referred to this issue in their Complaint at ¶ 25. (App. 24).

In Section 4 of the Georgia Supreme Court's opinion, the issue of a lack of a rational connection between what was regulated and the secondary effects was rejected. *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 270, 430 S.E.2d 726, 729 (1993); (App. 6 & 7). The Court addressed the argument that the 80%-20% benchmark was without a rational basis by saying that "[a]lthough there is nothing magical about the 20% cut-off . . . it does serve the purpose of excluding establishments which do not derive most of their income from alcohol and which are not, therefore, likely to produce the problems which the ordinance was intended to prevent." *Id.* 263 Ga. at 270, 430 S.E.2d at 729. The Georgia Supreme Court said that without the 80%-20% cut-off, the ordinance would be "too vague to enforce." *Id.* The Appellants in their brief at 8 & 23 argued that making bars sell non-alcohol items or reduce alcohol prices had no rational connection to the problem. Similar arguments were made in Appellants' Brief in Support of the Motion for Reconsideration at 8. The rationality argument was raised in the Complaint. (App. 24; 31 & 32). The ordinance drives alcohol price down and consumption up. The ordinance is, if not contradictory to its purpose, at least not rational.

The discussion in Section 3 of the Georgia Supreme Court's opinion did not address how the ordinance's banning of this band of "non-mainstream" speech in toto would leave appropriate access. *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. at 269, 430 S.E.2d 728 (1993). (App. 4-6). See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 53, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986); *11126 Baltimore Blvd. v. Prince George's County*, 684 F.Supp. 884, 892 (D.Md. 1988). Even though by proclamation the ordinance is said to aim at secondary effects, it shoots right though the heart of blue collar music and performance, to ban the same with no reasonable opportunity to have access to this mode of communication. This issue was raised in the Complaint. (App. 24, 31). The First Amendment issue was raised in Appellants' Brief before the Georgia Supreme Court at 18-25; in Appellants' Brief in Support of Reconsideration, it was raised at 6.

THE QUESTIONS ARE SUBSTANTIAL

1. **Whether in Georgia, which has not constitutionally prohibited the sale of alcohol where nude dancing is performed, due process or equal protection is violated by an ordinance which bans nude dancing at establishments when and if twenty (20) per cent or more of an establishment's gross annual income is from the sale of alcohol, where the State has interpreted "gross annual income" to be the "current income stream."**

While there is some precedent for price or wage regulation of activities directly related to an economic

problem at hand, *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (regulation of milk prices to protect existence and profitability of the dairy industry out of public health concerns; prosecution of person selling below established price did not violate due process); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (state minimum wage law for women upheld to prevent exploitation of unscrupulous employers), there do not seem to be any cases in which a comparison of the gross income from one item as compared to other items is used to regulate speech. The ordinance challenged herein does involve a revenue comparison similar in some respects to the comparison made in *Village of Schaumburg v. Citizens, etc.*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). The Richmond County ordinance is unusual, which in part explains its irrationality, and points to why a substantial question is raised.

Every other local government in the Country is using "place" to regulate, not ban, adult businesses. By zoning, *Renton* authorizes the regulation, but its mandate requires reasonable availability. Richmond County (and the City of Augusta) is hiding behind the shield of *Renton* and trying to ban non-mainstream dance at all blue collar bars. While local governments may be allowed to experiment with solutions, the experimentation ought not be at the expense of fundamental freedoms. The method of regulation used by Richmond County is tempting to many local governments because it offers a quick fix, compared to zoning fights.

The doctrine of limiting fundamental freedoms to prevent secondary effects, given a particular circumstance, can be a thinly veiled and formalistic rationalization. The method of regulation this ordinance uses pierces the veil and reveals that the content of the speech is the true target.

The ordinance's tool is not rationally related to the goal of the ordinance. If this ordinance is taken to its logical marketplace conclusion, it will drive the price of alcohol down, increase the consumption of alcohol, and achieve a result totally contradictory to stopping secondary effects. This ordinance, aside from the failure on content neutrality, results in an outcome that is "demonstrably irrelevant" to the problem at issue, and "hence an unnecessary and unwarranted interference with individual liberty." *Nebbia v. New York*, 291 U.S. 502, 539, 54 S.Ct. 505, 577, 78 L.Ed. 940 (1934).

The interpretation given this ordinance by the Georgia Supreme Court must be accepted by this Court. *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894, 895 (1949); *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The term "gross annual income" was given the meaning "the current income stream" by the Georgia Supreme Court. *S.J.T., Inc. d/b/a T J Smiles v. Richmond County, Georgia*, 263 Ga. 267, 270, 430 S.E.2d 726, 729 (1993).[8] The Georgia Supreme Court has made a bad

[8] On the same day the opinion challenged herein was issued by the Georgia Supreme Court, it issued an opinion in *Fleet Finance, Inc. of Georgia v. Jones*, 263 Ga. 228, ___ S.E.2d ___ (1993). In *Fleet* the Georgia Court had to interpret the term "per month" from a criminal usury statute applied in a class action to

situation worse, because now, when the benchmark is to be applied has become even more vague. The club could change from "mainstream" to "non-mainstream" at one moment. When the gross income from alcohol sales in the "current income stream" is twenty (20) percent or more, dancing that was legal at 12:00 could be illegal at 12:01. If the "mainstream-ness" of an establishment can be determined at any time during current income stream, a dancer and Appellants will be depending upon the acts of third parties to determine whether they are in violation of the ordinance. This will chill performances.

While *Renton* allows reliance on the studies that show problems of urban life, this situation is unique, because Appellant Fenmore is the first person to open a nude

---

recover usurious charges, based on Fleet Finance's method of calculating interest. The Georgia Supreme Court found that the term must be given the meaning most favorable to Fleet Finance, even in a civil context, becuase the statute could result in criminal liability, stating as follows:

> Must be construed strictly against the criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted. *Carsello v. State*, 220 Ga. 90, 94 (137 S.E.2d 305) (1964); *Bankston v. State*, 258 Ga. 88, 90 (367 S.E.2d 36) (1988). This rule applies even though a criminal statute is being construed in a civil context. *F.C.C. v. American Broadcasting Company*, 347 U.S. 284, 296 (74 S.Ct. 593, 98 L.Ed.2d 699) (1954); *Bingham Ltd. v. U.S.*, 724 F.2d 921, 925 (11th Cir. 1984).

Fleet Finance, Inc. of Georgia v. Jones, 263 Ga. 228, 231, ___ S.E.2d ___ (1993). As is reflected by Plaintiff-Appellant's Emergency Motion for reconsideration the ordi. ance challenged herein is criminal. *See* n. 4 *supra*.

dancing club in the unincorporated area of the County. Using the ordinance's comparison in this case shows nothing.

The *Renton* studies show how secondary effects are caused not by just one such bar, but by concentration of such bars. Solutions include spreading out the bars, so the problem is not locale obvious, or centralizing, so the problem is more economically policed. Because of *Renton*, the permissible solution is not to ban such bars. Appellants do not concede that the ordinance's 80%-20% establishes anything except that it is an arbitrary, "unmagical" figure. Georgia, unlike California where the State has prohibited alcohol in nude dancing establishments, has no such statewide limitation. *See also, California v. Larue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972); *Harris v. Entertainment Sys. Inc.*, 259 Ga. 701, 386 S.E.2d 140, 142 (1989).

This case is distinguishable from *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), because there a state statute prohibited public nudity, but allowed dancing with a minimal covering, so the erotic message was left intact. The ordinance herein eliminates a substantial band of speech on an arbitrary and irrational basis, and there is no safety net created by some other means. *See Schad v. Borough Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

A number of cases have found ordinances unconstitutional, but none of the ordinances were similar to the ordinance at issue here. *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) (ordinance not sufficiently tailored because it covered any theater that

showed an adult movie once); *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985) (lack of available alternative sites in ordinance)[9]; *Avalon Cinema Corporation v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (ordinance prohibited sale of any sexually explicit film, regardless of whether it was obscene, within one hundred yards of certain locations); *11126 Baltimore Boulevard, Inc., v. Prince George's County of Maryland, et al.*, 684 F.Supp. 884 (D.Md. 1988) (special exception provisions relating to whether adult bookstore would get a permit granted unfettered discretion in local authorities); *People Tags, Inc., et al., v. Jackson County Legislature, et al.*, 636 F.Supp. 1345 (W.D.Mo. 1986) (prior nonconforming use reasoning).

This case is worthy of the Court's consideration because it gives this Court the opportunity to address where the outer limits of the developing secondary effects doctrine are located.

2. **Whether the ordinance is in violation of the First Amendment if it attacks the alleged secondary effects of the combination of nude dancing and alcohol, not by place centralizing or dispersing non-mainstream nude dancing establishments, but by outright banning the content of "non-mainstream" nude dancing in bars where the stream of income from alcohol sales is twenty (20) percent or more.**

If the ordinance passes muster under the Fourteenth Amendment it still is in violation of the First Amendment

---

[9] The principle of requiring ample opportunities for similar speech played a factor in *Ebel*. *See e.g., Forsyth County, GA. v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2401 (1992).

because it bans a whole band of speech and does not make that speech reasonably available. This question goes hand in hand with the Fourteenth Amendment secondary effects questions about this unusual ordinance.

Although the ordinance contains the language of *Renton*, the language in the preamble is noteworthy for its absence of studies relating to a connection between gross annual income from alcohol sales and secondary effects.

There is nothing in the ordinance which ties gross income from alcohol revenues to secondary effects. No reference to such a study is made in the ordinance or record. *Renton* "analyzed the city's zoning scheme, comprehensive plan, and land uses around existing adult movie picture theaters." *Renton*, U.S. at 51, S.Ct. at ___.

If one assumes that the Commissioners had proof for their benchmark figure of 20%, even though it is not "magical", the ordinance's effect is still to totally ban whatever communication is beyond the benchmark.

3. Whether the ordinance is content neutral after the amendment.

The original 1991 ordinance banned nude dancing at establishments selling alcohol. (App. 35-38). The 1991 ordinance was not aimed at the location or place where nude dancing bars could be located in relationship to other places, but instead aimed at and banned the content of dance. The 1992 ordinance amended the 1991 ordinance by allowing "mainstream" dancing at establishments where the gross annual income from alcohol sales was less than twenty percent. (App. 38-41).

The complaint alleged the ordinance as amended by the 1992 ordinance was not content neutral. (App. 31, ¶ 35). In the Brief of [Appellants] before the Georgia Supreme Court, they argued that the ordinance violated the First Amendment, at 18 and 19. In its opinion, the Georgia Supreme Court summarily concluded that "there is no dispute . . . whether the government interest is unrelated to the suppression of speech." *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 268, 430 S.E.2d 726, 728 (1992) (App. 3). In Appellants' Brief in Support of the Motion for Reconsideration it was argued that the ordinance was not content neutral, especially after the overly broad application of *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993). Appellant argued that Section 1, of the Georgia Supreme Court's opinion, (App. 2 & 3) was "transparently erroneous" on the finding that there was "no dispute" about content neutrality. ([Appellants'] Brief in Support of the Motion for Reconsideration, filed June 24, 1993).

In *S.J.T. Inc.*, the Georgia Supreme Court, at 263 Ga. 272, 430 S.E.2d 726, 730 (App. 9) concluded that the Richmond County ordinance, like the one in *Gravely, supra*, was narrowly drawn to "impact only those modes of expression which . . . tend to be the focal points of negative effects." This is not the language of content neutrality.

Where the first ordinance banned nude dancing, instead of regulating where it could occur, the subsequent amendment allowing mainstream nude dancing based on an irrelevant comparison of alcohol versus non-alcohol gross income, does not make the whole ordinance content neutral. Mere recitation of *Renton* language by a county in

the preamble to an ordinance, as is a widespread practice, or recitation of the language from *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297, S.E.2d 250 (1982) by a state Supreme Court, ought not lead by baseless edict, to a deprivation of substantive rights. This issue is worthy of consideration because if law and equal protection is to mean anything, substance must prevail over form.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted this 12th day of October, 1993.

JOHN P. BATSON
Ga. Bar No. 042150
303 Tenth Street
Augusta, GA 30901
(706) 722-8191
Attorney for Appellants

INDEX TO APPENDIX

S.J.T., Inc. d/b/a T.J. Smiles v. Richmond County Georgia, 263 Ga. 267, 430 S.E.2d 726 (1993)..... App. 1

Trial Court Amended Order (December 4, 1992) .. App. 11

Georgia Supreme Court Order Denying Motion for Reconsideration (July 15, 1993)...App. 16

Complaint (September 28, 1992).....App. 17

Richmond County, Georgia Ordinances 91-15, September 10, 1991, and 92-5, September 1, 1992 (Referred to within as Ordinance) .....App. 35

Plaintiff-Appellant's Emergency Motion for Reconsideration (September 17, 1993).....App. 42

A. Ordinances..... App. 51

B. Citation for Nude Dancing (September 13, 1993).....App. 52

C. Letter from County Commission Setting Hearing for License Suspensions Revocation (August 14, 1993)..... App. 56

D. Order, Supreme Court of Georgia, Denying Reconsideration (July 15, 1993)..App. 58

E. Order, Supreme Court of Georgia Granting Application for a Ninety Day Stay Pending *Certiorari* Application (July 15, 1993)..... App. 59

F. Motion of Defendant to Lift Supersedeas (August 24, 1993).....App. 61

INDEX TO APPENDIX – Continued

G. Order of Supreme Court of Georgia, Lifting Court's Supersedeas for Plaintiff of February 12, 1993 (September 9, 1993).....App. 64

H. Order Granting Supersedeas to Plaintiff Pending Appellant Review (February 12, 1993).....App. 65

I. Affidavit of James V. Fenimore..... App. 66

J. Affidavit of Gina J. Cooley..... App. 71

K. Clippings of Admissions by Defendants Re: Interpretation of the Ordinances..... App. 75

L. Excerpts from Brief of Plaintiff-Appellant in Support of Motion for Reconsideration (June 24, 1993).....App. 78

M. Excerpts from Brief of Appellant 11, 24 (February 8, 1993).....App. 82

Order Regranting Stay Pending Appeal (September 20, 1993) .....App. 85

Notice of Appeal (October 8, 1993) .....App. 86

In the Supreme Court of Georgia

Decided: June 14, 1993

S9A0496. S.J.T., INC. d/b/a TJ SMILES et al.
V. RICHMOND COUNTY, GEORGIA et al.

BENHAM, Justice.

This appeal is from the trial court's refusal to enjoin enforcement of an ordinance of Richmond County prohibiting certain types of entertainment, attire and conduct on premises licensed to sell, serve or dispense alcohol beverages for consumption on the premises. In seeking the injunction, appellants expressed a desire to offer entertainment (nude dancing) in their establishment which would be violative of the terms of the ordinance. After stating its intent to suppress the increased crime rate and other negative secondary effects which the experience of other locales had shown to accompany barroom nude dancing, the ordinance provides in pertinent part as follows:

> *Section 2. Enactment.* The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve or dispense alcohol beverages for consumption on such premises within the unincorporated area of Richmond County.
>
> (1) The employment or any use of any person, in any capacity, in the sale or service of alcohol beverages while such person is unclothed or in such attire, costume or clothing, as to expose to view any portion of the female breast below the top of the areola or of any portion of the male or female

pubic hair, anus, cleft of buttocks, vulva and genitals.

(2) Live entertainment where any person appears in the manner described in paragraph (1) of this section or where such persons (or person) perform(s) acts of or acts which stimulate the following:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual act which is prohibited by law.

(b) The caressing or fondling of the breasts, buttocks, anus or genitals.

(3) The holding, promotion, sponsoring or allowance of any contest, promotion, special night, event or any other activity where patrons of the licensed establishment are encouraged or allowed to engage in any of the conduct described in paragraphs (1) and (2) above; provided, however, that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater which derives less than twenty (20) percent of its gross annual income from the sale of alcohol beverages.

1. This court has recently established that nude dancing is a form of expression protected by the free speech guarantees of the Constitutions of the United States and the State of Georgia. *Harris v. Entertainment Systems*, 259 Ga. 701 (386 S.E.2d 140) (1989). See also *Barnes v. Glen Theater, Inc.*, 501 US ___, (111 S.C. 2456, 115 L.E.2d 504, 511) (1991). In determining whether restriction on that expression is permissible, this court has

applied the test stated in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (297 S.E.2d 250) (1982), which requires that laws regulating such expression must (1) further an important government interest and (2) be unrelated to the suppression of speech, and (3) that the incidental restriction of speech must be no longer than is essential to further the government interest. See, e.g., *Pel Asso. v. Joseph*, Case No. S92A1260, decided March 18, 1993. As was the situation in *Gravely v. Bacon*, Case No. S93A0448, decided May 20, 1993; *Pel Asso.*, supra; and *Harris v. Entertainment Systems*, supra, there is no dispute in this case over whether the ordinance furthers the important government interest in reducing criminal activity and preventing reductions in property values associated with adult entertainment establishments or over whether the government interest is unrelated to the suppression of speech; the controversy in the present case concerns only the third requirement in the *Paramount* test. The question here, therefore, is whether the ordinance is narrowly drawn to further the county's interest in preventing the illegal activity and other negative effects associated with adult entertainment establishments offering nude dancing and alcohol.

2. Appellants first argue that because the portions of the ordinance which describe prohibited attire and conduct are patterned after OCGA § 3-3-41, and this court found that statute overbroad in *Harris*, supra, this ordinance must also fall. However, this court did not address in *Harris* the descriptions of appearance and conduct to

be regulated. Instead, that statute was found to be overbroad because it applied to premises and modes of communication which were not likely to produce the undesirable effects the statute was intended to prevent.

To the extent appellants' argument on appeal can be construed to constitute an "overbreadth" attack directed specifically to the description of prohibited attire and conduct in the ordinance at issue, we find no merit in the argument. The restrictions on attire are sufficiently narrow to exclude ordinary clothing, describing only modes of dress intended to expose or display those parts of the human body associated with sexuality. The conduct forbidden by the ordinance is specifically sexual and does not implicate ordinary public behavior. In addition to the narrowly drawn descriptions, the ordinance is crafted to limit its scope to live persons on the premises of establishments licensed to dispense alcohol beverages, thereby avoiding any impact on private behavior. Compare *Pel Asso.*, supra. We hold, therefore, that the descriptions of prohibited attire and conduct in the ordinance are sufficiently narrow in their scope to pass constitutional muster.

3. It is clear from a comparison of the ordinance with the holding of this court in *Harris*, supra, that Richmond County sought to avoid the particular overbreadth problems that were fatal to OCGA § 3-3-41. To avoid the impact on modes of expression which are not implicated in the production of negative secondary effects, the ordinance applies only to live entertainment and to employees and patrons present on the premises and excepts from the application of the ordinance "any mainstream performance house, museum or theater which

derives less than twenty per cent of its gross annual income from the sale of alcohol beverages."

Appellants contend the exception for mainstream performance houses, museums and theaters, based on derivation of less than 20% of gross annual income from the sale of alcohol, is void for vagueness. In support of that argument, appellants pose a series of questions which they assert the ordinance does not adequately answer, thereby exposing them to danger of prosecution:

> What is income and what sources may be considered? Can alcohol be sold at a loss, but high cover charges levied? . . . Does that gross income from the alcohol income apply only during those times when a dancer is nude and alcohol is served? . . . If the owner sells set-ups for alcohol, which are sold simultaneously, is the income from the set-up to be considered part of the alcohol gross income? since no drink is 100% alcohol, is the sale and dollar volume to be prorated by the percentage of the alcohol in any beverage? When does the year begin? . . . How is gross income measured? When does the measurement start? Can Plaintiff's [sic] give away beer, and include other income from other sources at the same location?

In order to avoid being void for vagueness, " 'all the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.' (Cit.)" *Sliney v. State*, 260 Ga. 167 (391 S.E.2d 114) (1990). While the ordinance at issue here does not answer every question which might arise about the legal operation of appellants' business, it does not function in a legal vacuum which would make such all-

inclusiveness necessary. Appellants' questions are capable of being answered by the application of common sense, accepted principles of accounting, and the plethora of laws and regulations controlling the sale of alcohol. We hold, therefore, that the ordinance is sufficiently specific in its terms to permit appellants to conduct themselves so as to avoid that which is forbidden.[1]

4. In another due process attack on the ordinance, appellants argue that basing the mainstream performance house exception on derivation of less than 20% of income from alcohol sales is invalid because there is no rational connection between that requirement and the secondary effect sought to be avoided. We disagree.

"(L)egislation is constitutional with respect to due process if it bears a rational relation to a proper and constitutionally permitted legislative purpose." *Department of Nat. Resources v. Union Timber Corp.*, 258 Ga. 873, 876 (4) (375 S.E.2d 856) (1989). The exception in the ordinance is obviously intended to limit the application of the ordinance to those establishments which experience has taught are most likely to produce undesirable secondary effects, i.e., bars and nightclubs, both being types of establishments for which alcohol sales make up the largest portion of income. Although there is nothing

---

[1] This holding applies equally to appellants' argument that they should be permitted to offer nude dancing for one year without enforcement of the ordinance in order to establish their "gross annual income." Applying to their current income stream the principles and laws referred to above will adequately inform appellant whether they come within the exception in the ordinance.

magical about the 20% cut-off employed by Richmond County, it does serve the purpose of excluding establishments which do not derive most of their income from alcohol and which are not, therefore, likely to produce the problems which the ordinance was intended to prevent. Thus, there is a rational relation between the purpose of the ordinance and the use of an income level to distinguish between establishments controlled by the ordinance and those not within its scope. While using a cut-off of 21% or of 19% may have been just as effective, some particular figure must be chosen if alcohol-derived income is to be used as a measure; otherwise the ordinance would be too vague to enforce. We hold, therefore, that the use of a 20% cut-off does not lack a rational relation to the proper legislative purpose of limiting the undesirable effects of combining public nudity with alcohol consumption.

5. Mounting an equal protection attack on the ordinance, the appellants contend that the ordinance constructs a class-based regulatory scheme by creating artificial distinctions between "high-brow" nudity in mainstream performance houses and "low-brow" nudity in nightclubs and bars. The distinction to be drawn, however, does not involve the socio-economic status of the patrons of the differing establishments, but the impact the establishments have on the community. The effect of the ordinance is to classify adult entertainment establishments, which experience[2] has shown to produce undesired secondary effects, differently than mainstream

---

[2] As we noted in *Gravely*, supra, fn.4, the U.S. Supreme Court has held that communities enacting ordinances to regulate adult entertainment are entitled to rely on the experience of

entertainment establishments, which have not been shown to produce negative effects on the community.

> Even applying a heightened level of scrutiny because the fundamental right of free expression is involved, a city may classify and regulate adult entertainment establishments differently from other places of entertainment. (Cit.)

Gravely, supra, Div. 3.

6. Finally, appellants contend that the ordinance denies them due process of law and unconstitutionally impairs their contracts by forcing them to derive income from some other source than sale of alcohol beverages and by depriving them of full use of the licenses issued them by the county. These arguments fail simply because the ordinance does not have the effects attributed to it by appellants. Appellants are free to continue conducting business as they have been doing in accordance with the license they have been issued, none of which specifically permits public nudity or any other conduct prohibited by the ordinance. Nothing in the record, including the

---

other communities with regard to the secondary effects of adult entertainment establishments. *City of Renton v. Playtime Theaters*, 475 U.S. 41, 51 (106 SC 925, 89 LE2d 29) (1986). In Section 1 of the ordinance at issue here, Richmond County specifically enunciated its reliance on the experience of other communities and its concern with the undesirable effects (e.g., increased crime and lowered property values) produced by the combination of alcohol consumption and public nudity "in so-called 'nude bars' or establishments offering so-called 'nude entertainment' or 'adult entertainment' . . . " On the other hand, as was the case in *Harris*, supra, no one has suggested that the combination of alcohol and depictions of nudity in mainstream performance houses, museums and theaters produce such negative secondary effects.

licenses issued to appellants by Richmond County, establishes any vested right, contractual or otherwise, to both operate a bar and offer nude dancing.

7. In conclusion, we hold that the ordinance in question, like the one considered in *Gravely*, supra, is a

> carefully and narrowly drawn regulatory scheme which makes appropriate distinctions between public and private behavior and which impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of the negative effects such as increased crime, (and therefore passes) constitutional muster notwithstanding some restriction of protected expression.

Pel Asso., supra, Div. 2. Accordingly, we affirm the trial court's finding of constitutionally and its refusal to enjoin enforcement of the ordinance.

Judgement [sic] affirmed. All the Justices concur, except, Hunt, P.J., and Sears-Collins, J., who dissent. Clarke, C J., not participating.

S93A0496. S.J.T., Inc. v. RICHMOND COUNTY

SEARS-COLLINS, Justice, dissenting

Our country places the highest priority on the right of its citizens to speak, to write and to otherwise express themseives as they see fit, even though some may find some of the expression objectionable. Compelling evidence of a prevailing interest must be shown in order to surmount this high priority.

In this case, the majority appears to take the existence of the undesirable secondary effects purportedly sought to be prevented by the Richmond County ordinance as a given when, in fact, the evidence of undesirable secondary effects stemming from the combination of nude dancing and alcohol is no more than was present in *Gravely v. Bacon*, Case No. S93A0440 (decided May 20,1993), a case to which I also dissented. I must, therefore, dissent in this case because I am loathe to diminish the standard for reviewing restrictions on First Amendment guarantees based on evidence with very little, if any weight or substance.

I am authorized to state that Justice Hunt joins in this dissent.

INT [sic] THE SUPERIOR COURT OF
RICHMOND COUNTY

STATE OF GEORGIA

S.J.T., INC., d/b/a/ TJ SMILES, and JAMES FENIMORE,	)	CIVIL ACTION FILE NO. 92-RCCV-910
Plaintiffs,	)	
vs.	)	
RICHMOND COUNTY, GEORGIA and CHARLES WEBSTER	)	
Defendants.	)	

AMENDED ORDER

WHEREAS, the Court issued an order in the above-captioned case, and

WHEREAS, the Court has amended the order and as amended said order reads as follows:

ORDER

Presently before the Court is Plaintiffs' motion for temporary injunction. The Court conducted a hearing on the motion October 6, 1992. After reviewing the evidence presented at said hearing, affidavits and briefs of the parties, the Court hereby DENIES Plaintiffs' motion, based on the following findings of fact and conclusions of law.

FINDINGS OF FACTS

1. Plaintiff James Fenimore owns the Alamo Plaza Motel, located at 1250 Gordon Highway in Richmond County, Georgia.

2. The Alamo Plaza Motel includes a building used as a nightclub, TJ SMILES.

3. Plaintiff S.J.T., Inc. owns and operates TJ SMILES.

4. Plaintiffs have valid 1992 state and county licenses to sell alcoholic beverages at TJ SMILES.

5. Nude dancing has never taken place at TJ SMILES.

6. Plaintiffs desire nude dancing at TJ SMILES.

7. Richmond County Ordinance 91-15, as amended by Richmond County Ordinance 92-5, prohibits certain attire, conduct and entertainment, including nude dancing, in establishments with alcoholic beverage licenses.

8. Defendants intend to enforce the Ordinance described in Paragraph 7, above.

9. Plaintiff's request the Court enjoin Richmond County from enforcing Richmond County ordinance 91-15, as amended by ordinance 92-5.

CONCLUSIONS OF LAW

1. JURISDICTION. Jurisdiction and venue are proper in this Court.

2. CONSTITUTIONALITY. Nude dancing is expressive conduct within First Amendment protection. *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701 (1989).

3. Laws infringing upon protected expression such as nude dancing must meet the traditional First Amendment analysis.

4. Such laws will be upheld if:

a. the law furthers an important government interest,

b. The government interest is unrelated to the suppression of speech, and

c. The incidental restriction of speech is no greater than is essential to the furtherance of that interest.

5. Richmond County Ordinance 91-15, as amended by Ordinance 92-5, meets the *Paramount* test stated above.

a. The ordinances seek to further the important government interest of decreasing criminal activity and undesirable community conditions associated with establishments which serve alcohol and also allow and/or encourage nudity. Richmond County Ordinance 91-15, Section 1.

b. Said government interests is unrelated to the suppression speech.

c. The restriction of speech in this case is no greater than is essential to the furtherance of the government interest.

6. This case is distinguishable form [sic] *Harris, supra*, and *Yarbrough v. the City of Carrollton*, 262 Ga. 444 (1992).

7. The laws considered in *Harris* and *Yarbrough* were so broad as to prohibit not only nude dancing in bars, but also to prohibit nude and sexual conduct in mainstream performance house, museums and movie theaters.

9. The Richmond County Ordinances apply to live entertainment and employees, and do not apply to any "mainstream performance house, museum, or theater which derives less than twenty (20) percent of it gross annual income from the sale of alcohol beverages." Richmond County Ordinance 92-5, Section 2 (3).

10. The Richmond County Ordinances are so narrowly drawn as to not unnecessarily infringe on protected speech and are valid.

11. INJUNCTIVE RELIEF. For Plaintiffs to obtain injunctive relief, they must show:

a. a substantial likelihood of success on the merits of their case,

b. they will suffer irreparable harm if an injunction is not granted,

c. the threatened injury to them outweighs whatever damage may occur to defendants by granting the injunction, and

d. granting the injunction will not harm the public interest.

12. Plaintiffs do not meet any of the requirements stated above.

13. Plaintiffs have never had nude dancing at TJ SMILES, thus Defendants have never made any effort to enforce said ordinances against Plaintiffs.

14. This Court refuses to enjoin Defendants from enforcing Richmond County Ordinances 91-15 and 92-5.

SO ORDERED, this ___ day of December of 1992.

_____

SUPREME COURT OF GEORGIA

ATLANTA JULY 15, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93A0496

S.J.T., INC., D/B/A TJ SMILES, ET AL. V. RICHMOND COUNTY, GEORGIA, ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, P.J., and Sears-Collins, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta
I certify that the above is a true extract from
the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court
affixed the day and year last above written.
Sherie M. Welch, Clerk.

IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

S.J.T., INC. d/b/a TJ SMILES, and JAMES FENIMORE Plaintiffs, v. RICHMOND COUNTY, through its COMMISSIONERS and the Chair of the Commissioners of Richmond County, HENRY BRIGHAM, in his official capacity, THE SHERIFF OF RICHMOND COUNTY, CHARLES WEBSTER, individually and in his official capacity, and Defendants.	*	CIVIL ACTION NO. _____ DAMAGES DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT

Now come the Plaintiffs who show the Court the following:

Jurisdiction and Venue

1.

All actions which gave rise to this complaint and the actions which this complaint seeks to enjoin occurred, or will occur, within Richmond County, and therefore jurisdiction is proper in this Court. Venue is proper because one or more defendants reside or is found within this jurisdiction.

2.

The Plaintiffs seek damages, costs and attorneys fees against the Defendant County and the Defendant Sheriff pursuant to 42 U.S.C. § 1983 and § 1988 for deprivation of state created property interests and liberty interests under the Georgia Const., art. 1, § 1, ¶¶ 1, 2 & 5 without due process of law or without equal protection of the laws in violation of the First and Fourteenth Amendments of the United States Constitution.

Parties

3.

S.J.T. INC., d/b/a TJ SMILES is a Georgia corporation duly registered to do and is doing business in Richmond County, Georgia, as TJ Smiles, operating an establishment duly licensed since Fall 1991 through the present to sell alcohol, beer, and wine and have dancing and its owners have attempted to and wish to have nude dancing at the TJ SMILES premises.

4.

JAMES FENIMORE (hereinafter "Fenimore"), a resident of Augusta, Richmond County, Georgia, is one of the owners of the who [sic], has been duly licensed to sell alcohol, beer and wine and to have dancing on the premise of TJ SMILES continuously since Fall, 1991. He is also one of the shareholders in S.J.T., INC.

5.

HENRY BRIGHAM, is a resident of Richmond County, Georgia and is Chair of the Commissioners of Richmond County, through whom the County acts, and the County has passed formal policies which unlawfully deprived the Plaintiffs of privileges and immunities guaranteed the Plaintiff by the First and Fourteenth Amendments of the United States Constitution and of the interests created by the Georgia Const., art. 1, § 1, ¶¶ 1, 2, 5 & 7.

6.

The Defendant Sheriff has a public duty to which he is sworn, O.C.G.A. § 45-3-1 & 7, to uphold the Constitutions of the State of Georgia and the United States, as determined by the highest courts of those sovereigns, and that failure of that duty directed at the Plaintiffs which has caused injury to the Plaintiffs is actionable under O.C.G.A. § 51-1-1 & 6 for injuries caused thereby.

7.

CHARLES WEBSTER, is a resident of Richmond County, Georgia and Sheriff of Richmond County, Georgia, and he is sued individually and in his official capacity as the Sheriff of Richmond County, and he is one whose acts and edicts may fairly be deemed to represent County practice and custom and the County is liable therefore, and either he or he has caused his agents to unlawfully deprive the Plaintiffs of privileges and immunities guaranteed the Plaintiff by the First and Fourteenth

Amendments of the United States Constitution and of the interests created and protected by the Georgia Const., art. 1, § 1, ¶¶ 1, 2, 5 & 7.

Facts

8.

On December 5, 1989, the Georgia Supreme Court interpreted the Constitution of Georgia, art. 1, § 1, ¶ 5, to protect commercial nude dancing, which is not obscene; and the United States Constitution Constitution [sic] has been similarly interpreted throughout the time of the operative facts.

9.

In the Summer of 1991 Plaintiff James Fenimore bought the property and improvements on Gordon Highway in Richmond County, Georgia known as the Alamo Plaza Motel, which included a building used as a nightclub.

10.

Plaintiff S.J.T., Inc. was created to own and operate TJ SMILES.

11.

In June 1991 the Plaintiff James Fenimore for TJ SMILES applied for the Richmond County alcohol, beer, wine, and dancing licenses, the Commissioners approved them on July 9, 1992, and they were purchased on July 10,

1991; and the Richmond County licenses were renewed for 1992.

12.

Plaintiff James Fenimore and TJ SMILES has paid over $6000 to the County for license fees for one half of 1991 and 1992, and said licenses are not transferable and the fees are not refundable.

13.

Plaintiffs' State license, which cost $200 per year, was effective on a temporary basis on August 16, 1991, and on a permanent basis on October, 1991, and said license has been renewed for the year 1992.

14.

In the Summer and Fall of 1991 the Plaintiff James Fenimore let it be known that he was planning to have performances in which the dancers would be nude but to operate within the confines of the law, the liberty and property interests created by the State of Georgia and the United States Constitutions.

15.

Plaintiff intended to have dancers, who at some point in their performance would probably disrobe, on an elevated central stage and on portable stages.

16.

Female Waitresses and bartenders, who sell or carry drinks were to be dressed in bikini-type clothes and were to be the ones who would discuss and execute the sale of alcohol with customers.

17.

The Plaintiffs offer entertainment for adults 21 years of age or older and have careful procedures to ensure that only adults 21 years of age or older are employed or are admitted.

18.

Some of the conduct sought to be made unlawful by the Ordinances would conceivably apply to activities offered by or sought to be offered by Plaintiff TJ Smiles Lounge.

19.

On or about August 5, 1991, Ron Strength, a Chief Deputy for Defendant Sheriff Webster, came to Plaintiff James Fenimore and told the Plaintiff that if the club were to have nude dancers "we" would shut it down and take the liquor licenses.

20.

That it was not until September 10, 1991 that the Defendant County, at the insistence of the Defendant Sheriff, passed Ordinance 91-15 which attempted to ban nude dancing. (Attached hereto as Exhibit A).

21.

That a similar ordinance from the City of Augusta was challenged as unconstitutional in this Court in *Discotheque Inc., d/b/a/ Discotheque Lounge and Steven D. Scott v. City Council of Augusta, and Charles A. DeVaney,* Civil Action File No. 91-RCCV-1002, and while this Court found it to be constitutional the Georgia Supreme Court stayed enforcement of the ordinance pending outcome of litigation.

22.

That in August 1992 the Superior Court of Richmond County struck down the County's Ordinance 91-15 as unconstitutional under the Georgia Constitution in response to a motion as a defense to a criminal prosecution for violation of Ordinance 91-15.

23.

That in late August 1992 once again Ronald Strength threatened the Plaintiff James Fenimore that the Defendant Sheriff did not want nude dancing in the County, and that if Plaintiff Fenimore were to operate with nude dancers he would be arrested and his liquor license taken away.

24.

On September 1, 1992, the County Commission, at the insistence of the Defendant Sheriff, passed an Ordinance (attached hereto as Exhibit B) amending Ordinance

91-15, which makes it unlawful to perform nude on premises licensed to sell or dispense alcoholic beverages, except "any mainstream performance houses, museums, theaters which derives less than twenty (20) percent of its gross annual income from the sale of alcohol beverages."

25.

That the amendment referenced in the paragraph above is a thinly veiled attempt to ban all nude dancing in the County, without due deference to the rights and interests of the Plaintiffs, and citizens who would be customers, and is a denial of equal protection of the Georgia Const. art. 1, § 1, ¶¶ 2 & 1 and U.S. Const. amend. V & XIV.

26.

That as a result of the unlawful actions by Defendants Sheriff and County, through its agents, the Plaintiffs' Fenimore, and TJ SMILES were unlawfully restrained from exercising property rights, right to contract and right to business speech through a denial of equal protection and due process of the laws of the State of Georgia and the Georgia Const. art 1, § 1, ¶ 1, 2 & 5 and U.S. Const. amend. I, V & XIV.

27.

That the Ordinances and the actions and threats of the Defendant Sheriff have sought to impose limitations and sanctions on the Plaintiffs although the Plaintiff has not been, nor can he be shown, to have caused the alleged

secondary effects alleged by the Ordinances and imposed on the Plaintiffs in denial of Plaintiffs' exercise of property rights, right to contract and right to business speech through a denial of equal protection and due process of the laws of the State of Georgia and the Georgia Const. art 1, § 1, ¶ 1, 2 & 5 and U.S. Const. amend. I, V & XIV.

28.

Plaintiffs have a substantial interest in life, liberty and property as alleged in the foregoing and that the prospective enforcement of said Ordinance and the 1992 amendment, which Ordinances they allege to be unconstitutional, will unlawfully deprive Plaintiffs of their protected interests or rights in life, liberty and property without due process and in violation of equal protection of the laws.

29.

As an additional sanction for the prohibited conduct, Plaintiffs Fenimore and TJ SMILES believe that the Defendant County would unlawfully suspend or revoke all alcoholic beverage licenses of the licensed premises if anyone were to dance nude.

30.

Plaintiffs are informed, believe and, therefore allege that unless restrained and enjoined from so doing, the Defendants will enforce the provision of the Ordinances, both with respect to the criminal sanctions and the sanctions with respect to the alcoholic beverage licenses.

31.

Plaintiffs are informed, believe and, therefore allege, that the County through the Sheriff will selectively enforce said Ordinances, limiting the regulation to night-clubs where the content of the nudity is live, when the plain terms of it apply to any type of activity where alcoholic beverages are licensed to be sold and consumed and there is any nudity, regardless of the content of the message.

32.

Certain of the entertainment sought to be offered to the public by the TJ Smiles Lounge could be said to violate some of the provisions of the Ordinances and Plaintiffs are uncertain as to their course of action because of the sanctions attached to said laws and, thus, are entitled to a declaratory judgment concerning its validity and application.

33.

Because of the terms of the Ordinances and the threatened enforcement, in effect, imposes censorship and prior restraint on dance routines, publications, trying to capture the same on photographic film, television, and other forms of expression on premises licensed to sell or serve alcoholic beverages, including Plaintiffs' premises.

34.

Plaintiffs allege that all or parts of the Ordinance and the 1992 Amendment are unconstitutional and void as

hereinafter specified and that they are entitled to a declaratory judgment declaring their rights and liabilities thereunder and to an injunction against its enforcement as to them.

35.

Article 1, Section 1, Paragraph 1, of the Constitution of the State of Georgia provides:

> No person shall be deprived of life, liberty, or property except by due process of law.

Under this paragraph, a law or part thereof, which does not with definiteness and certainty specify the proscribed conduct is unconstitutional and void, or if the law is overly broad it is unconstitutional and void. Further, this paragraph protects commercial nude dancing which is not obscene.

36.

Article 1, Section 1, Paragraph 2, of the Constitution of the State of Georgia provides:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

Enforcement of an ordinance against one person or group and not against all is prohibited, enforcement of the laws must be limited to those who can be proven by due process of law to have caused the violation of the laws.

37.

Article I, Section I, Paragraph V, of the Constitution of the State of Georgia provides:

> No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

Under this paragraph dancing which is not obscene may not be prohibited. Under that section any exercise of censorship or prior restraint is invalid and actions so doing are unlawful.

38.

The Ordinance is unconstitutional and void in that it violates the provisions of the Constitution of Georgia by:

(a) Vague and indefinite;

(b) Overly broad;

(c) Curtails or restrains freedom of speech; and

(d) Denies equal protection of the law.

39.

The enforcement of the Ordinances against these Plaintiffs and those similarly situated in the selective manner proposed by Defendants County and Sheriff deny Plaintiffs and those similarly situated, denies equal protection of the laws which is prohibited by Article I, Section I, Paragraph II, of the Constitution of Georgia.

40.

Ordinance 91-15, Section 2, prohibits in any "non-mainstream" premise

> (1) The employment or use of the services of any person, in any capacity, in the sale or service of alcohol beverages while such person is unclothed or in such attire costume or clothing, as to expose to view any portion of the female breast below the top of the areola or any portion of the male or female pubic hair, anus, cleft of the buttocks, vulva and genitals.

is unconstitutional and void for the reason that it is too vague and indefinite to be capable of enforcement; is overly broad; and violation of the provisions of the Constitution of Georgia.

41.

So much of the Ordinance Section 2 (2) which prohibits the performance on licensed premises of acts which constitute or simulate:

> (2) Live entertainment where any person appears unclothed in the manner described in paragraph (1) of this section or where such person (or persons) perform(s) acts of or acts which simulate any of the following:
>
> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or any sexual act which is prohibited by law;
>
> (b) The touching, caressing or fondling of the breasts, buttocks, anus or genitals;

> (c) The displaying of the male or female pubic hair, anus, vulva, genitals or any portion of the female breast below the top of the areola.

is unconstitutional and void for the reason that it is too vague and indefinite to be capable of enforcement; is overly broad; and seeks to prohibit nudity which is a protected activity, all in violation of the provisions of the Constitution of Georgia.

42.

Plaintiffs are without an adequate remedy at law for that if they comply with all of the terms of the Ordinances in each of the ways it can be interpreted, it will cause substantial injury to their liberty and property rights, yet if they do not comply in all respects with the Ordinance and the various ways in which it can be interpreted, then they subject themselves to the loss of the alcoholic beverage licenses for the place of business with its concomitant loss to the investment and a loss of job and income.

43.

Plaintiffs show that if the Ordinances are enforced as written, it would cause irreparable financial harm, to each of them and to their property and liberty rights including, but not limited to, a loss of the alcoholic beverage licenses, and Plaintiff Fenimore would have his livelihood severely cut or destroyed and face the possibility of incarceration.

44.

Plaintiffs are without an adequate remedy at law for that [sic] their loss of property and property rights as a result of the enforcement of the Ordinances could not be adequately recovered.

CLAIM 1.

45.

That the Richmond County Adult Entertainment and Zoning Ordinance 91-15 and the 1992 Amendment (hereafter the Ordinances) unconstitutionally infringe upon the rights of free speech and free expression guaranteed by the Georgia Const., art. 1, § 1, ¶ 5 and U.S. CONST. amend. I.

CLAIM 2.

46.

That said Ordinances and any of this County's liquor laws banning nudity, are facially unconstitutional as vague and overbroad under the Georgia Const., art. 1, § 1, ¶ 5 and U.S. CONST. amend. I.

CLAIM 3.

47.

That the Ordinances violate the Plaintiffs' rights to equal protection and due process under Georgia Const., art. 1, § 1, ¶¶ 1 & 2 and U.S. CONST. amend. V & XIV.

CLAIM 4.

48.

That the Ordinances as applied to the Plaintiffs is an unconstitutional taking of liberty and property rights protected by Georgia Const., art. 1, § 1, ¶¶ 1 & 2 and U.S. CONST. amend. V & XIV.

CLAIM 5.

49.

That the actions and threatened action of the Defendants, even in the absence of an ordinance, as enforced by prior restraint against Plaintiffs TJ Smiles, violated or will violate the rights of speech, due process and equal protection under Georgia Const., art. 1, § 1, ¶¶ 1, 2 & 5 and U.S. CONST. amend. I, V & XIV.

CLAIM 6.

50.

That the actions of the Defendants prior to the passage of the Ordinance unlawfully restrained Plaintiff TJ Smiles the freedom of expression depriving them of liberty and property rights to establish nonconforming use through exercise of protected commercial speech, in violation of Georgia Const., art. 1, § 1, ¶¶ 1, 2 & 5 and U.S. CONST. amend. I, V & XIV.

CLAIM 7.

51.

The Defendant Sheriff has breached his public duty to the Plaintiffs, have caused injury thereby, and he is liable therefore. O.C.G.A. § 51-1-1 & 6..

WHEREFORE, Plaintiffs pray:

(a) That Summons issue as provided by law;

(b) That the Plaintiffs have a temporary restraining order and temporary and permanent injunction prohibiting defendants or anyone acting in concert with them or pursuant to their direction from enforcing or attempting to enforce the provision of the Ordinance and the 1992 Amendment or the will of the Defendant Sheriff against the Plaintiffs or their business;

(c) That a Rule Nisi issue calling on the Defendants and each of them to be and appear at a place and time certain to show cause, if any they have, why they should not be restrained and enjoined form [sic] enforcing the Ordinance and the 1992 Amendment as prayed;

(d) That pending a final trial that the Defendants, and each of them, and anyone acting in conjunction with them or pursuant to their directions or under their control be restrained and enjoined form [sic] enforcing the provisions of the Ordinances against the Plaintiffs;

(e) That Plaintiffs have a declaratory judgment declaring their rights and liabilities under the Ordinances, including a declaration that the same is unconstitutional and void;

(f) That the Plaintiffs should be awarded actual and compensatory damages against the Defendant County;

(g) That the Plaintiffs should be awarded punitive damages against Defendant Sheriff Webster;

(h) That the Plaintiffs should be awarded attorney's fees pursuant to 42 U.S.C. § 1988 and/or their bad faith actions which required institution of this action;

(i) That the Plaintiffs have such other and further relief as may be equitable and just;

(j) That any properly disputed issue of fact be tried by a jury.

John P. Batson
Ga. Bar No. 042150
Attorney for Plaintiffs

Prepared by:

John P. Batson
303 Tenth Street
Augusta, GA 30901

(706) 722-8191

Ordinance No. 91-15

AN ORDINANCE PERTAINING TO PROHIBITED TYPES OF ENTERTAINMENT, ATTIRE AND CONDUCT IN ESTABLISHMENTS WITH AN ALCOHOL BEVERAGE LICENSE IN THE UNINCORPORATED AREA OF RICHMOND COUNTY; TO REPEAL CONFLICTING ORDINANCES; TO PROVIDE AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF RICHMOND COUNTY, GEORGIA, AND IT IS HEREBY ORDAINED BY AUTHORITY OF THE SAME THAT THE CODE OF RICHMOND COUNTY, GEORGIA, BE AMENDED BY DELETING THEREFROM THE CURRENT LANGUAGE OF SECTION 3-34, PART II OF SAID CODE AND INSERTING IN LIEU THEREOF THE FOLLOWING:

Section 1. Findings; Public Purpose. Based on the experience or other urban counties and municipalities, including, but not limited to Atlanta and Fulton County, Georgia; Dekalb County, Georgia; and Ft. Lauderdale and Palm Beach, Florida, which experiences we believe are relevant to the problems faced by Richmond County, Georgia, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the commission that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars: or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal

behavior and tends to create undesirable community conditions. Among the acts of criminal behavior identified with nudity and alcohol are disorderly conduct, prostitution, and drug trafficking and use. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for and allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

Section 2. Enactment. The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve or dispense alcohol beverages.

(1) The employment or use of the services of any person, in any capacity, in the sale or service of alcohol beverages while such person is unclothed or in such attire, costume or clothing, as to expose to view any portion of the female breast below the top of the areola or of any portion of the male or female pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) Live entertainment where any person appears in the manner described in paragraph (1) of this section or where such persons (or person) perform(s) acts of or acts which simulate any of the following:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual act which is prohibited by law.

(b) The touching, caressing or fondling of the breasts, buttocks, anus, vulva or genitals.

(c) The displaying of the male or female pubic hair, anus, vulva or genitals

(3) The holding, promotion, sponsoring or allowing of any contest, promotion, special night, event or any other activity where patrons of the licensed establishment are encouraged or allowed to engage in any of the conduct described in paragraphs (1) and (2) above.

Section 3. Severability. It is hereby declared to be the intention of the Board of Commissioners that the sections, paragraphs, sentences, clauses and phrases of this enactment are severable, and if any phrase, clause, sentence, paragraph or section hereof shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this enactment, since the same would have been enacted by the Board of Commissioners without the incorporation herein of any such unconstitutional phrase, clause, sentence, paragraph or section.

Section 4. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

Section 5. This ordinance shall become effective on September 10, 1991.

APPROVED AND ENACTED by the Board of Commissioners of Richmond County, Georgia, this 10th day of September, 1991.

_____

Chairman, Board of Commissioners
of Richmond County, Georgia

ATTEST:

_____

County Administrator

ORDINANCE NO. ___

AN ORDINANCE TO AMEND ORDINANCE NO. 91-15 PERTAINING TO REGULATING AND PROHIBITING CERTAIN TYPES OF ENTERTAINMENT, ATTIRE, AND CONDUCT IN ESTABLISHMENTS LICENSED TO SELL, SERVE OR DISPENSE ALCOHOLIC BEVERAGES ON THE PREMISES IN THE UNINCORPORATED AREA OF RICHMOND COUNTY; TO REPEAL CONFLICTING ORDINANCES; TO PROVIDE AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF RICHMOND COUNTY, GEORGIA, AND IT IS HEREBY ORDAINED BY AUTHORITY OF THE SAME THAT THE CODE OF RICHMOND COUNTY, GEORGIA, BE AMENDED BY DELETING IN ITS ENTIRETY SECTION 2 OF ORDINANCE NO. 91-15, AND SUBSTITUTING IN LIEU THEREOF THE FOLLOWING:

Section 1. Section 2 of Ordinance No. 91-15 is stricken in its entirety and substituted in lieu thereof the following:

"Section 2. Enactment. The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve, or dispense alcohol beverages for consumption on such premises within the unincorporated area of Richmond County.

(1) The employment of use of any person, in any capacity, in the sale or service of alcohol beverages while such person is unclothed or in such attire, costume or clothing, as to expose to view any portion of the female breast below the top of the areola or of any portion of the male or female pubic hair, anus, cleft of the buttocks, vulva and genitals.

(2) Live entertainment where any person appears in the manner described in paragraph (1) of this section or where such persons (or person) perform(s) acts of or acts which stimulate any of the following:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual act which is prohibited by law.

(b) The caressing or fondling of the breasts, buttocks, anus or genitals.

(c) The displaying of the male or female pubic hair, anus, vulva or genitals.

(3) The holding, promotion, sponsoring or allowance of any contest, promotion, special night, event of any other activity where patrons of the licensed establishment are encouraged or allowed to engage in any of

the conduct described in paragraphs (1) and 2) above; provided, however, that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater which derives less than twenty (20) per cent of its gross annual income from the sale of alcohol beverages."

Section 2. All ordinances of parts of ordinances in conflict herewith are hereby repealed.

Section 3. This ordinance shall be effective on September 1, 1992.

APPROVED AND ENACTED by the Board of Commissioners of Richmond County, Georgia, this 1st day of September, 1992.

_____

Chairman, Board of Commissioners
of Richmond County, Georgia

ATTEST:

_____

County Administrator

IN THE SUPREME COURT OF GEORGIA

NO. S93A0496

S.J.T., INC. d/b/a T J
SMILES AND JAMES FENIMORE

Plaintiffs-Appellants

vs.

RICHMOND COUNTY, GEORGIA
and CHARLES WEBSTER

Defendants-Appellees

APPELLANT'S MOTION FOR RECONSIDERATION

REQUEST FOR EXPEDITED
OR
EMERGENCY PROCESSING

On Appeal from the
Superior Court of Richmond County
Civil File No.: 92-RCCV-910

John P. Batson
Georgia Bar Number 042150
303 Tenth Street
Augusta, Georgia 30901

(706) 722-8191

Attorney for Appellants T J Smiles
and James Fenimore

IN THE SUPREME COURT OF GEORGIA

S.J.T., INC. d/b/a TJ SMILES, et al.,	)	
	)	Sup. Ct. No.
Appellant,	)	S93A0496
	)	
v.	)	
RICHMOND COUNTY, GEORGIA, et al.,	)	
	)	
Appellees.	)	
	)	

APPELLANT'S MOTION FOR RECONSIDERATION

NOW COMES, the Appellant who hereby moves this Court for a reconsideration, or for a clarification of the September 9, 1993 order lifting the supersedeas, which the County has interpreted to have lifted the ninety day stay of July 15, 1993, which had granted time in which to file the petition for certiorari.

All motions filed herein are of an emergency nature. On September 13,1993 the County charged the Appellant with "Allowing Nude Dancing" at an establishment which holds an alcoholic beverage license, and there is no allegation that the Appellant does not meet or cannot meet the less than 20% gross annual income exception of the ordinance. More importantly, the County has notified the Plaintiff it will consider suspension or revocation of his liquor license **Tuesday, September 21, 1993 at 4:00 p.m.** (Exhibit **C**).

The Appellant is simultaneously filing a motion for stay and motion for contempt, all of which are incorporated herein. The evidence in support thereof is also incorporated herein.

Respectfully submitted this 17th day of September, 1993.

/s/ John P. Batson
John P. Batson
Ga. Bar No. 042150
Attorney for Appellant

Prepared by:

John P. Batson
303 Tenth Street
Augusta, Georgia 30901

706-722-8191

IN THE SUPREME COURT OF GEORGIA

S.J.T., INC. d/b/a TJ SMILES, et al.,	)	
Appellant,	)	Sup. Ct. No. S93A0496
v.	)	
RICHMOND COUNTY, GEORGIA, et al.,	)	
Appellees.	)	

BRIEF IN SUPPORT OF ALL MOTIONS
Motion for Reconsideration
Motion for Contempt
Motion for Stay
Jurisdiction

This Court has jurisdiction because the remittitur has not occurred and the Appellant has not yet filed for certiorari. This Court has the authority to enforce its orders. O.C.G.A. § 9-11-62(e). The order of July 15, 1993 (Exhibit E) granting a ninety day stay is being disregarded by a criminal prosecution (Exhibit B) and an imminent license revocation (Exhibit C), for "allowing nude dancing", and nothing more. This Court's opinion in *S.J.T.., Inc. d/b/a T.J. Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993) is being disregarded. The clear language of the ordinance is being disregarded, which provides for an exception to allow nude dancing if the club's gross annual income from the sale of alcohol is less than twenty percent. (Exhibit A).

Facts

On July 15, 1993, this Court granted a ninety day stay, pending an application for certiorari, which remains in effect until approximately October 15, 1993. (Exhibit E). A supersedeas stopping enforcement of the ordinance had earlier been granted to Appellants on February 12, 1993. (Exhibit H).

On August 24, 1993 the Appellees filed a motion to lift the supersedeas (Exhibit F) which had been granted by this Court. (Exhibit H). Nowhere in their motion to lift the supersedeas (Exhibit F, ¶¶ 1-4) is there any indication that they seek to be relieved of the ninety day, certiorari stay of this Court's July 15. 19933 [sic] order. (Exhibit E).

On September 9, 1993, this court lifted the February 1993 supersedeas. (Exhibit G).

On September 13, 1993, an officer with Richmond County Sheriff's Department charged the Appellant with a violation of a local ordinance for allowing nude dancing in an establishment with an alcohol license to Plaintiff-Appellant herein (Exhibit I). A dancer was charged with dancing nude in an establishment that sells alcohol. (Exhibit I). The criminal citations do not contain any allegations that the Plaintiff's establishment does not qualify as a mainstream performance house, under the objective, 20%-80%, alcohol-non-alcohol, gross annual income standard of the ordinance. (Exhibit A); *S.J.T.., Inc. d/b/a T.J. Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993). (Exhibit A). As forewarned in the Appellants' Brief in Support of Motion for Reconsideration, at 1 & 2 (Exhibit L) filed approximately June 24,

1993, the County interprets the ordinance to have a separate subjective requirement of a "mainstream performance house", that the Appellant's establishment is not such a house, and therefore because the Appellant serves alcohol and has nudity he is in violation of the ordinance.

Argument

The ninety day stay of July 15, 1993 is still in effect notwithstanding the fact that this Court lifted the supersedeas of February 12, 1993. If the ninety day stay is still in effect, the Appellees are in contempt and their actions should be labelled as such, and the prosecution and license suspension/revocation hearing stayed. Appellees should be appropriately fined, by means of further motions and hearing before this Court.

The language of the ordinance is clear and this Court's opinion in *S.J.T., Inc. d/b/a T.J. Smiles v. Richmond County, Georgia*, 263 Ga. 267, 430 S.E.2d 726 (1993) is clear. While a layperson would say the County won the appeal, to a lawyer the appeal also declared, in this declaratory action, that the saving grace of the ordinance is the 80%-20% objective standard, and the County's action is in contempt of this Court's ruling.

Even if the ninety day stay has been lifted, this is a declaratory action and this Court has jurisdiction. Appellant warned this Court that Appellees would take the position that their ordinance had a subjective component and banned nude dancing at the Appellant's club, notwithstanding the objective 80-20 % standard therein, or any future evidence on the subject. (Exhibits L & M). The

Appellant's prosection and the license action should be barred.

If the September 15, 1993 order was intended to lift the ninety day stay this decision should be reconsidered. Even if this Court clearly intended to lift the ninety day stay, the interpretation of the ordinance which is the basis of the County's actions should be reconsidered on the merits, and dealt with in summary fashion, as being in violation of their own ordinance.

The Plaintiff and the independent performers will suffer irreparable harm by the taking of protected rights without meaningful due process. (Exhibits I and J). *Massachusetts State Grange v. Benton*, 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387 (1926). The Appellant will not be able to avail himself of meaningful opportunity to due process if this declaratory action is functionally ripped away from him by misinterpretation of not only this Court's orders, but the County's own ordinance. The Appellee's tactic is to give only the appearance of due process and equal protection and do that which is politically expedient. The orderly process of dispute resolution, and who controls it in substance is at issue here – the legislative and executive or the judiciary. The Appellees' further violations of an orderly dispute resolution process must be stopped.

The threatened actions of the County and the criminal charge based on a wishful interpretation of the ordinance are beyond the scope of their authority, as well as beyond this Court's stay of July 15, 1993, notwithstanding the lifting of the February 1993 supersedeas. *See eg., Lane v. Watts*, 234 U.S. 525, 34 S.Ct. 965, 58 L.Ed. 1440 (1914). The Appellees have no power to take any action against

the Plaintiff merely because he has nude dancers at his establishment which was licensed to sell alcohol, even before the ordinances were created. *See eg., Garfield v. United States*, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168 (1908).

Respectfully submitted this 17th day of September, 1993.

/s/ John P. Batson
John P. Batson
Ga. Bar No. 042150
Attorney for Appellant

Prepared by:

John P. Batson
303 Tenth Street
Augusta, Georgia 30901

706-722-8191

Index to Exhibits

A. Ordinances

B. Citation for Nude Dancing

C. Letter from County Commission of August 14, 1993, Setting Hearing for License Suspensions Revocation

D. Order of July 15, 1993, Supreme Court of Georgia, Denying Reconsideration

E. Order of July 15, 1993, Supreme Court of Georgia, Granting Application for a Ninety Day Stay Pending *Certiorari* Application

F. Motion of Defendant to Lift Supersedeas of August 24, 1993

G. Order of September 9, 1993, Supreme Court of Georgia, Lifting Court's Order of February 12, 1993

H. Order of February 12, 1993, Granting Supersedeas to Plaintiff Pending Appellant Review

I. Affidavit of James V. Fenimore

J. Affidavit of Gina J. Cooley

K. Clippings of Admissions by Defendants Re: Interpretation of the Ordinances

L. Brief of Plaintiff – Appellant in Support of Motion for Reconsideration, 1,2 & 5

M. Brief of Appellant, Filed February 8, 1993; 11,24

EXHIBIT A

Ordinances reproduced herein at App. 35-41, as attached to Complaint in original filing.

EXHIBIT B

GEORGIA
4892
UNIFORM TRAFFIC CITATION, SUMMONS,
ACQUISITION/WARNING

NCIC No.
RICHMOND COUNTY SHERIFF'S DEPARTMENT
AUGUSTA, GEORGIA 3091

SECTION I – VIOLATOR

[ ] A.M.
Upon Month SEPT. (Day) 13 (Yr.) 1993 at 2120 [/] P.M.

License Class or Type C State GA Endorsements ___
Expires 5/95

License No. 163468779

Name FENIMORE, JAMES VINCENT
(Last) (First) (Middle)

Address 1250 GORDON HWY

City AUGUSTA, State GA Zip Code 30901

DOB 051454 Hair GRAY Hgt 6'0"

Wgt 225 Sex M Eyes ___

Veh. Yr. ___ Make N/A Style ___ Color ___

Registration No. ___ Yr. ___ State ___

COMMERCIAL DRIVER LICENSE [ ] YES [ ] NO

COMMERCIAL VEHICLE [ ] YES [ ] NO

ACCIDENT [ ] YES [ ] NO

(ONE VIOLATION PER CITATION)

Within the State of Georgia, did commit the following offense: SPEEDING –

Clocked by [ ] PATROL VEHICLE [ ] VASCAR

'[ ] RADAR (Seal # ___ Calibration/Check ___)
at ___ MPH in a ___ zone

[ ] DUI (Test Administered:
[ ] BLOOD [ ] BREATH [ ] URINE
[ ] OTHER) DUI Test Results _____

TEST ADMINISTERED BY (If Applicable):

SECTION II – VIOLATION

OFFENSE (Other than above) **ALLOWING NUDE DANCING**

In Violation of Code Section ___ of [ ] State Law
[✓] Local Ordinance

REMARKS **SUBJ. WAS ALLOWING NUDE DANCING IN T.J. SMILES LOUNGE, WHICH ALSO HOLDS AN ALCOHOLIC BEVERAGE LICENSE**

SSN # 163462779 RACE: B [W] I A PHONE _____

POE OWNER RELEASED TO: _____

WEATHER	(A) ROAD (B)		TRAFFIC	LIGHTING
[ ] Clear	[ ] Dry	[ ] Conrete	[ ] Light	[ ] Daylight
[ ] Cloudy	[ ] Wet	[ ] Blacktop	[ ] Medium	[ ] Darkness
[ ] raining	[ ] Ice	[ ] Dirt	[ ] Heavy	[ ] Other
[ ] Other	[ ] Other	[ ] Other		

COMMERCIAL VEHICLE INFORMATION

[ ] Commerical Vehicle Violation

[ ] Hazardous Material Violation (PLACARD)

SECTION III – LOCATION

County of RICHMOND and 5 miles S of (city) AUGUSTA

On Gordon Hwy At or Near mile post _____

or within (city) _____

at/on (secondary location) _____

OFFICER (Print) STONEY R. TURNAGE

Badge # 10083 Div. 510

You are hereby ordered to appear in Court to answer to this charge on the 14th day of Oct.

1993 at 0830 [/] AM [ ] PM in the Magistrate Court

at _____

SECTION IV – SUMMONS

Floor Municipal Building, Augusta, Georgia

Pursuant to Georgia Code 17-6-11, if a drivers license is surrendered in lieu of bail, a copy of the citation shall serve as a temporary drivers license until the court date, but it shall not be valid for more than 45 days from the date the citation is issued. SERVICE: This notice shall constitute official service to you that failure to dispose of this citation as outlined above shall be deemed a violation of this code section and shall cause the designated Court in this matter to forward your drivers license to the Department of Public Safety, and there it shall be placed in suspension. The suspension shall remain in effect until such time as the designated court, in the manner prescribed, notifies the Department of Public Safety of a satisfactory disposition in this matter. (NOTE: If drivers license is not surrendered in lieu of bail, Georgia Code 40-5-56 provides for the suspension of the drivers license

of a person who fails to respond to a citation to appear before a designated Court.)

SECTION V – OFFICER CERTIFICATION

LICENSE SURRENDERED IN LIEU OF BAIL

[ ] YES [ ] NO RELEASED TO _____

SIGNATURE ACKNOWLEDGES SERVICE OF THIS SUMMONS AND RECEIPT OF COPY OF SAME.

SIGNATURE James V. Fenimore

ARRESTING OFFICER'S CERTIFICATION

The undersigned has just and reasonable grounds to believe, and does believe, that the person named herein has committed the offense put forth contrary to law.

SIGNATURE Stoney R. Turnage Badge # 10083/510

Signature of Arresting Officer

VIOLATOR'S COPY
AUTHORIZED AND APPROVED PURSUANT TO:
CODE 40-13-1-D.P.S. REG. 570.19

EXHIBIT C

HOBSON CHAVOUS
Chairman
HENRY H. BRIGHAM
Vice-Chairman
DON A. GRANTHAM
FREDDIE L. HANDY
WILLIE MAYS
LEE NEEL, III
LARRY E. SCONYERS
MOSES TODD

BOARD OF COMMISSIONERS

RICHMOND COUNTY, GEORGIA

ROOM 605 • CITY-COUNTY MUNICIPAL, BLDG. (11)
AUGUSTA, GEORGIA 30911
Bus. (706) 821-2488
Fax No. (706) 722-5984

LINDA W. BEAZLEY
County Administrator
ROBERT C. DANIEL, JR.
County Attorney
Reply To:
P.O. Box 2125
Augusta, GA 30903

September 14, 1993

HAND DELIVERED

Mr. James V. Fenimore
T.J. Smiles
1250 Gordon Highway
Augusta, Georgia 30901

Dear Mr. Fenimore:

Please be advised that the Board of Commissioners of Richmond County will conduct a hearing on Tuesday,

September 21, 1993, at 4:00 P.M. at the County Commission hearing room, sixth floor, City-County Municipal Building, 500 block of Greene Street, Augusta, Georgia, to consider probation, suspension and/or revocation of all of your alcohol beverage licenses for the premises located at 1250 Gordon Highway, for alleged violation on September 13, 1993 of Section 3-34, Part II, of the Richmond County Code.

Section 3-34, Part II, of the Code prohibits certain types of entertainment, attire and conduct upon any premises licensed to sell, serve and dispense alcohol beverages.

Enclosed are copies of Ordinance No. 91-15 and 92-5 which provide the provisions of Section 3-34, Part II, of the Code of Richmond County.

Please be present at the hearing to present any evidence you may have.

Yours very truly,

/s/ Bob C. Daniel
ROBERT C. DANIEL, JR.

RCDJr/hbs
Enclosures
CC: Sheriff Charles B. Webster
Mrs. Linda W. Beazley
Mr. Marion Farr

EXHIBIT D

Order of Supreme Court of Georgia, July 15, 1993 reproduced herein at App. 16, denying reconsideration.

EXHIBIT E

S93A0496

SUPREME COURT OF GEORGIA

Atlanta July 15, 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BY: BENHAM, J.

The following direction was given:

S.J.T., INC., d/b/a TJ SMILES, et al. v. RICHMOND COUNTY, GEORGIA, et al.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on July 15, 1993 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme

Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Robert Benham
Justice Robert Benham

EXHIBIT F

IN THE SUPREME COURT OF GEORGIA

CASE NO. S93A0496

S.J.T., INC., d/b/a/ T.J. SMILES AND JAMES FENIMORE	)
APPELLANTS	)
V.	)
RICHMOND COUNTY, GEORGIA AND	)
CHARLES WEBSTER	)
APPELLEES	)

MOTION TO VACATE SUPERSEDEAS

HARRY D. REVELL
STATE BAR NO. 601331

ROBERT C. DANIEL
STATE BAR NO. 204400

ATTORNEYS FOR APPELLEES

BURNSIDE, WALL, DANIEL
AND ELLISON
454 GREENE STREET
POST OFFICE BOX 2125
AUGUSTA, GEORGIA 30903
(706) 722-0768

IN THE SUPREME COURT OF GEORGIA

CASE NO. S93A0496

S.J.T., INC., d/b/a T.J. SMILES AND JAMES FENIMORE	)
APPELLANTS	)
V.	)
RICHMOND COUNTY, GEORGIA AND CHARLES WEBSTER	)
APPELLEES	)

MOTION TO VACATE SUPERSEDEAS

NOW COME appellees Richmond County, Georgia and Charles Webster and move the Court for an order vacating supersedeas and as grounds therefor respectfully show the following:

1. On February 12, 1993 this Court granted appellant's motion for supersedeas and ordered that "the enforcement of Richmond County ordinances 91-15 and 92-5 be stayed with regard to appellants pending appellate review."

2. On June 14, 1993, this Court rendered its decision and opinion in this matter and affirmed the Trial Court's judgment which refused to enjoin enforcement of said ordinances.

3. On July 15, 1993 appellants' motion for reconsideration was denied.

4. Through its opinion and denial of appellants' motion for reconsideration, this Court has completed appellate review of this matter. Since appellate review

has been completed, the previously entered supersedeas should be vacated at this time.

Respectfully submitted this 24 day of August, 1993.

/s/ Harry Revell
HARRY D. REVELL
STATE BAR NO. 601331

/S/ Robert C. Daniel, Jr.
ROBERT C. DANIEL, JR.
STATE BAR NO. 204400
ATTORNEYS FOR APPELLEES

BURNSIDE, WALL, DANIEL AND ELLISON
POST OFFICE BOX 2125
AUGUSTA, GEORGIA 30903
(706) 722-0768

CERTIFICATE OF SERVICE

This is to certify that I have served the within and foregoing upon Jack Batson, 303 10th Street, Augusta, Georgia 30901 by mail prior to filing.

This 24 day of August, 1993.

/s/ Harry Revell
OF COUNSEL FOR APPELLEE

EXHIBIT G

S93A0496

SUPREME COURT OF GEORGIA

ATLANTA SEP 9 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

S.J.T., INC. d/b/a/ TJ SMILES et al. v. RICHMOND COUNTY, GEORGIA et al.

It appearing that appellate review of this case was concluded, this court's order of February 12, 1993, staying enforcement of the ordinances involved in this case "pending appellate review," is hereby vacated.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb,
Deputy Clerk

EXHIBIT H

S93A0496

SUPREME COURT OF GEORGIA

ATLANTA FEB 12 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

S.J.T., INC., d/b/a/ TJ SMILES et al. v. RICHMOND COUNTY, GEORGIA et al.

Upon consideration of the Motion for Supersedeas filed by appellants in this appeal, it is ordered that it be hereby granted and that the enforcement of Richmond County Ordinances 91-15 and 92-5 be stayed with regard to appellants pending appellate review. Clarke, C.J., Hunt, P.J., Benham, Fletcher, Sears-Collins, and Hunstein, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Sherrie M. Welch
Clerk

EXHIBIT I

STATE OF GEORGIA:
RICHMOND COUNTY:

AFFIDAVIT OF JAMES V. FENIMORE

Personally appeared the undersigned who upon being duly sworn deposes and says that the following facts are true of his own personal knowledge:

1. I am adult competent to make this statement.

2. I am one of the owners of T.J.Smiles, Inc., and we operate a business called T.J.Smiles located in Richmond County, Georgia, with a common address of 1250 Gordon Highway, Augusta, Georgia.

3. That at about 9:00 p.m. on September 13, 1993, vice officer, Stoney Turnage of the Richmond County Sheriff's Department approached me at my business while a dancer was dancing, who had disrobed while I was the "DJ" announcing the performances and the songs, and asked me whether the woman performer was going to put on clothes.

4. No inquiry was made by Mr. Turnage about the percentage of the gross income from alcohol sales.

5. No inquiry has ever been made by any authority from anywhere about the percentage of the gross income from alcohol versus non-alcohol at T.J. Smiles.

6. That I have never been informed of any procedure whereby I am to report my annual gross income from alcohol sales versus non-alcohol sales to the State Authority which licenses me, or anyone associated with the County.

7. That I replied no to Mr. Turnage's question about whether I was going to make her put on clothes, at which time he walked away from me and in a loud voice announced to my customers, who at that time numbered about forty and were watching the woman performer, that if you all know what is good for you, you will get out of here while you can.

8. That announcement caused thirty of [sic] more people to get up and entirely leave the premises.

9. At about 9:20 p.m. he wrote and handed me a "Georgia Uniform Traffic Citation, Summons, Accusation/Warning", a copy of which is attached hereto Exhibit B, charging me with "Allowing Nude Dancing", a local ordinance violation, with the remarks "subj. was allowing nude dancing in T.J. Smiles Lounge, which also holds an alcoholic beverage license."

10. That I am to appear in Magistrate Court on October 14, 1993, to face criminal charges for this violation.

11. That Officer Turnage also charged a dancer, Laura Wilson, whose stage name is Christy, with "Nude Dancing" in an establishment that serves alcohol.

12. That attached hereto as Exhibit C is a letter dated September 14, 1993, informing me that I must appear before the Richmond County Board of Commissioners to consider probation, suspension and/or revocation of all alcoholic beverage licenses.

13. That I am asking my lawyer to file a petition for certiorari to the United Sates Supreme Court on the constitutionality of the face of the Richmond County ordinance (Copy attached as Exhibit A) in this declaratory action, Supreme Court of Georgia, S.J.T., INC d/b/a TJ SMILES and JAMES FENIMORE v. RICHMOND COUNTY, GEORGIA and CHARLES WEBSTER, NO. S93A0496.

14. That it was my understanding that on July 15, 1993 this Court issued a stay of the proceedings for ninety days from July 15, 1993, pending an application for certiorari.

15. My reading of this Court's opinion and the ordinance lets me provide nude dancing and sell alcohol, so long as gross income from alcohol sales is less than twenty per cent of the gross annual income.

16. That apparently the County is taking one of two positions: First, that no nude dancing is permissible at my club because it is not a "mainstream performance house", on some subjective basis, without even any allegation that my club does not meet the definition in the ordinance of a mainstream club because the annual gross income from alcohol sales is twenty percent or more, or second, that the County believes nude dancing can be banned in Richmond County pursuant to this ordinance at any premise licenses [sic] to serve alcohol.

17. That on the evening of September 13, 1993, my gross income from alcohol sales was less than twenty per cent.

18. That I have been informed of no process by which the alcohol versus non-alcohol income is to be determined or reported.

19. That if I am not granted a stay that will stop the proceedings in the Magistrate Court and before the County Commission I will have been denied my due process and equal protection rights, for determination of speech related rights through this declaratory action and will be subjected to a multiplicity of actions.

20. During the pendency of this appeal the County through the District Attorney, as the plaintiff in a civil capacity, filed a nuisance action for "lewdness", which kept my establishment closed for over a month beginning Master's Week for "lewd" behavior, and I had not received any communications from any authority, that a nuisance existed, either inside or outside of my establishment.

21. That action is currently on appeal before this Court in JAMES V. FENIMORE d/b/a T.J. SMILES LOUNGE v. STATE OF GEORGIA, NO. S93A1541, and from their brief it appears as if they want to dismiss that action so they can bring it again and deny my rights to due process and equal protection, through the natural delay that occurs through all litigation if nothing else.

22. That the multiplicity of litigation is too expensive and if the stay is not enforced while the certiorari petition is being prepared I will have to begin fighting not only the criminal ordinance violation but on next Tuesday a license hearing, before the very same Board that wrote the ordinance in question, and apparently is

interpreting the ordinance to allow banning of nudity in my type of club.

23. That if my business is shut down I will have no resources to continue the process of review of [sic] the face of the ordinance, not to mention financial disaster from which I may never recover.

24. That I will suffer a denial of due process and equal protection if I have to go through the license suspension and revocation hearing on September 21, 1993 because the notice (Exhibit C) does not inform me in what manner a violation has taken place, nor does the notice (Exhibit C) even in conjunction with the ticket or charge inform me in what manner the County claims the ordinance has been violated, other than "allowing" nude dancing.

25. That if the stay is not enforced, and at least the 80-20% on the face of the ordinance and this Court's order applied, the County Commission will unfairly take my license, and I will be irreparably harmed.

26. That if I have to litigate whether the ordinance bans nude dancing, regardless of the gross income from alcohol sales, I will be subjected to a multiplicity of lawsuits and denied the equal protection for which I filed this action for declaratory relief.

/s/ James V. Fenimore
James V. Fenimore

SUBSCRIBED AND SWORN to before me
this 16th day of Sept, 1993.

/s/ John P. Batson
NOTARY PUBLIC, STATE OF GEORGIA

EXHIBIT J

STATE OF GEORGIA:
RICHMOND COUNTY :

AFFIDAVIT OF GINA J. COOLEY

Personally appeared the undersigned who upon being duly sworn deposes and says that the following facts are true of her own personal knowledge:

1. That my name is Gina J. Cooley and that my signature is below.

2. That I am a woman above the age of twenty one years.

3. That I am a resident of the State of Georgia.

4. That I earn a living by exotic dancing, which means that during parts of my performances I disrobe.

5. That I earn my living as an exotic dancer because I can make more money in a shorter time than I can in any other job, because of physical and psychologial [sic] /neurological limitations caused by a 1990 auto accident.

6. That in high school I was in honors history class at Dalton High School, where I graduated in May 1980.

7. That I began college at Reinhardt College, a private Christian college, in March of 1987 and was taking general courses with an emphasis on business.

8. That my grades ranged from A's to C's at Reinhardt, although I did have difficulty with a 100-level English class, which I eventually passed at Georgia State.

9. That at various times when I was going to school at Reinhardt I was working as a secretary/receptionist/

bookkeeper for two companies from 8-5, would go to school three nights a week from 6-10, and I worked at a movie theater four nights a week.

10. On Saturdays and Sundays I worked at least eight hours at the theater.

11. During my last six months at Reinhardt I worked only one full-time job and went to school at night.

12. In late August 1989 I got a job with Mitchell's Formal Wear in Chattanooga working at a minimum fifty hours per week.

13. That in December 1989 I was transferred as a manager trainee of stores for Mitchell's Formal Wear in the Chattanooga, Tennessee area to Antioch, Tennessee, where I became the manager of the store.

14. That in March of 1990 I was in an auto accident in Murfreesboro, Tennessee when I was rear-ended after I had stopped for an accident on the interstate.

15. I suffered a severe whiplash.

16. As a result of this injury I have had physical problems, but more importantly I lost a great deal of my capacity to remember.

17. I had to resign from Mitchell's June 9, 1990 because of problems caused by the auto accident.

18. That in August 3, 1990 I got a job with Tamco Inc., a property management company, as a staff accountant/bookkeeper, and I kept all of the books for ten different properties, but I just could not do the job

because my right arm had problems and because of my memory problems I had to quit in the end of September, 1991.

19. That in January of 1991 I started to attend Georgia State University in general business with an emphasis in accounting classes.

20. I attended GSU for two quarters and during April of 1991 I had outpatient surgery to make the swelling in my spine recede and hopefully reduce the pain on my back, and I just did not do well in school.

21. Two weeks after the outpatient surgery I was hospitalized because the needle from the surgery punctured my spinal sack which caused pain at the top of my spine.

22. That to relieve this problem the Doctors had to inject a large amount of my blood into my spine to make the bulge recede.

23. That it took me a couple of months to just be able to move around.

24. That I had no money so I could not pay my rent and I was physically evicted June 6, 1991.

25. That in September 1991 I went to New York and started dancing as an exotic dancer.

26. That in June or July of 1992 I wanted to work closer to home so I started working in Atlanta at Follies.

27. That I still cannot do accounting work because of the injuries caused to my ability to remember.

28. That dancing has been therapeutic for me because the exercise has helped me start to recover physically.

29. That I have performed for money at the following entertainment clubs in Georgia: Oasis (Dekalb County, Georgia), Follies (Dekalb County, Georgia) and TJ Smiles (Richmond County, Georgia).

30. That I want to continue to work at TJ Smiles because it is convenient to home in the Atlanta area, because I make more money, and have working conditions which are more pleasant than the clubs in Atlanta.

31. That I plan to work at TJ Smiles indefinitely.

32. That I support myself by the money I earn by performing exotic dances at these, and hopefully other clubs.

/s/ Gina J. Cooley
GINA J. COOLEY

SUBSCRIBED and SWORN to before
me this 15th day of September, 1993.

/s/ John P. Batson
NOTARY PUBLIC, STATE OF GEORGIA

EXHIBIT K

AUGUSTA CHRONICLE, WED., SEPT. 15, 1993

Nude club may lose licenses

By J.D. Gallop and Kim Henderson
Staff Writers

The Richmond County Commission might provide a little strip show of its own in the case of T.J. Smiles owner Jim Fenimore.

On Tuesday, Richmond County sheriff's deputies hand-delivered a letter to Mr. Fenimore requesting him to appear before the county commission next week to determine whether his business or alcohol licenses will be revoked.

Monday night, deputies from the sheriff's department vice squad made two separate visits to the Gordon Highway strip club, citing Mr. Fenimore and Larra Etta Wilson, 23, of the 100 block of Meridian Avenue, North Augusta, with violating the county's nude dancing ordinance.

Mr. Fenimore was also charged with allowing nude dancing in his club.

Chief Deputy Ronald Strength cited the Georgia Supreme Court's ruling Thursday allowing the enforcement of the county ordinance banning nude dancing.

In July, Mr. Fenimore and his attorney, Jack Baston [sic], appealed a ruling by the court on the ordinance and were granted a 90-day stay of enforcement. However, the stay was

Please see **CLUB** *on* **10A**

CLUB: Owner asked to attend meeting

Continued from **7A**

lifted last week before the end of the 90 days, allowing the original ruling that the ordinance was constitutional to stand.

"We filed a motion to get (the stay) lifted about two to three weeks ago. The next step is for them to appear at the county commission meeting," said county attorney Robert Daniel.

Chief Deputy Strength, who entered the club with the county vice squad shortly after 11 p.m. Monday, said Tuesday that his department would continue to enforce any violation of law in the county, strip club or no.

"He was informed of the court ruling by me and told that his place would be monitored," said the chief deputy.

"When we walked in (the dancer) was dancing (naked)," the chief deputy said.

After Monday's visits by deputies, Mr. Fenimore criticized the sheriff's department for "harassing" him and his establishment, words he's spoken several times since the ordinance was passed,

"We've got drive-by shootings; you can't even go to the mall and be safe. Why are they selectively

"

The next step is for them to appear at the county commission meeting.

Robert Daniel,
county attorney

harassing me?" Mr. Fenimore said Monday evening after the second visit from deputies.

Both Mr. Fenimore and Ms. Wilson will have to appear in court Oct. 14 to answer charges.

EXHIBIT L

IN THE SUPREME COURT OF GEORGIA

S.J.T., INC. d/b/a/ TJ SMILES, et al., Appellant, v. RICHMOND COUNTY, GEORGIA, et al., Appellees.	Sup. Ct. No. S93A0496 MOTION FOR STAY PENDING *CERTIORARI*

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Objection to Introduction

This Court applied the ruling in *Gravely v. Bacon*, Case No. S93A0448, decided May 20, 1993 in issuing its ruling of June 14, 1993 herein. Appellants had no opportunity to brief the impact of *Gravely* on the Richmond County ordinance.

From one reading of the decision herein it appears that *Gravely* has given the Richmond County ordinance an overly broad application. *Gravely* dealt with a regulation that altogether banned certain conduct based on "modes" of expression,[1] whereas the most reasonable objective interpretation of the Richmond County ordinance, allows nude dancing in any premise where the

[1] Use of the term *mode* so that the term *content* is avoided, allowing a more liberal standard of review, is substantively hollow.

gross annual income from alcohol sales is less than twenty percent. If this Court's opinion herein bans nude dancing at the Appellant's establishment, notwithstanding the Richmond ordinance's apparent objective twenty percent alcohol sales standard, this application of *Gravely* is overly broad.

If this ordinance applies *Gravely* subjectively, it violates prongs of the test in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968). The ordinance, especially now that this Court has interpretted [sic] the ordinance, is not content neutral, by its overly broad application of *Gravely;* if the ordinance in question allows nudity and alcohol, how much a premise makes on alcohol versus non-alcohol sales does not further a substantial governmental interest; the ordinance if interpreted to have a subjective component that can outweigh the objective component, is clearly regulating "modes" or content of expression; the regulation is all or nothing for premises above the twenty percent mark, and is greater than is necessary to further the government's interest.

Counsel asks for reconsideration to reconfirm that functionally, so long as Appellant's business meets the objective test of less than 20% gross annual income from alcohol sales, then he can have nude dancing and alcohol sales. In general however counsel interprets the opinion, along with *Gravely* to say that any ordinance may ban not only nude dancing and alcohol, but even nude dancing alone, so long as it meets the test of Paramount Pictures Corp. v. Busbee, 250 GA. 252 (297 SE 2d 250) (1982), because all such ordinances are aimed at secondary effects, and therefore content neutral.

Objections to Section 1.

Appellant objects to section one as to the conclusion

* * *

the position that he intends to violate the terms of the ordinance by the content of the dancing. Appellant has taken the position, that as interpreted by the County, any nude dancing would violate the terms of the ordinance, even if Appellant met the 80%-20% alcohol sales figures. Appellant asks this Court to reconsider the decision which declares that it is Appellant's intention to violate the ordinance by the form, mode or content of the dance.

Appellant objects to an application of the *Renton* principles to the particular ordinance of this case, because no evidence has been introduced in this facial challenge to the ordinance. In fact, this establishment is bordered by a swamp, a used car lot, a similar motel and a four lane highway, and evidence later will show this is the most profitable use of his premise, and may revitalize this commercial industrial area.

Appellant specifically objects, to any conclusion or construing of the record that Appellant admits, that the ordinance is unrelated to the suppression of speech. Appellant specifically asserts that the ordinance is making a distinction in the interpretations of this Court since *Gravelly v. Bacon*, Case#S93A0448, decided May 20, 1993 that this ordinance permissibly makes a distinction based on the "mode" or content of the expression.

Appellant never had any opportunity to brief or argue the application of *Gravely* to this case. Therefore,

Appellant cannot be deemed to have admitted or waived any argument with respect to *Gravely*.

* * *

EXHIBIT M

EXCERPTS FROM BRIEF OF APPELLANT
(FEBRUARY 8, 1993)

* * *

amendment of 91-15 by ordinance 92-5, by permitting nude dancing and alcohol in "mainstream" establishments, provided the yearly gross income from alcohol is less than twenty (20) percent of gross income, sufficiently narrows the reach of the ordinance to overcome the infirmities of O.C.G.A. § 3-3-41 found in *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Section 1 – Secondary Effects Language

The preamble of ordinance 91-15, Section 1, sets out the perfunctory secondary effects language, based on *Renton v. Playtime Theaters, Inc, et al.*, 475 U.S. 41 (1986). The Plaintiff believes this language may not apply in this case, depending on proof at trial, but that at most, it only gives the County limited control of the availability of nudity and alcohol. The ordinance's method of requiring a club to commerce in non-alcohol business as required by Section 2(3) (Ex. B) does not however rationally relate to the control of the stated secondary effects.

Section 2 – Prohibited Nudity Defined

The ordinance, of course, has definitions of prohibited nudity. (Ex. B., Sec. 2).

> "*Section 2. Enactment.* The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve, or dispense alcohol beverages for consumption on

such premises within the unincorporated area of Richmond County.

(1) The employment of use of any person, in any capacity, in the sale or service of alcohol beverages while such person is unclothed or in such attire, costume or clothing, as to expose to view any portion of the female breast below the top of the areola or of any portion of the male or female pubic hair, anus, cleft of the buttocks, vulva and genitals.

* * *

alcohol to have nudity. Making a business get income from a third source, other than alcohol, has no relationship to the controlling secondary effects. Second, there is no rational connection between the particular percentage of twenty, (20%) and prevention of crime. Measuring the alcohol by dollar volume has no rational connection to prevention of secondary effects, and the sale of "other" items, such as income from food, has no rational relationship to secondary effects. Third, making clubs that already have licenses but are not in the restaurant business sell food or other items, has no logical connection to preventing secondary effects.

The ordinance's end run attempt to avoid protected speech pitfalls causes equal protection and due process problems. *See e.g., Southern Entertainment v. City of Boynton Beach,* 736 F.Supp. 1094 (S.D.Fla. 1990).

Ultimately the ordinance would artificially drive the price of alcohol down so the establishment could meet the under 20% barrier, thereby increasing the chance of the presumed secondary effect of drunkenness, etc. There is no way the doctrines of equal protection and due

process can be rationally applied where the ordinance is in direct conflict with its own purpose. One can only conclude that no operation which follows *Harris* and *Yarbrough* can exist in compliance with the County's ordinance. Richmond County is using the ordinance as a tool to keep all such businesses out of the County and its cope is therefore overbroad. *Harris; see also, Zwicker v. Koota,* 389 U.S. 241 (1967) (regulation sweeps too broad).

* * *

CERTIFICATE OF SERVICE

This is to certify that I have served the within and foregoing upon Burnside, Wall, Daniel, and Ellison, Mssrs. Daniel, Revell and Ellison, at 454 Greene Street, P.O. Box 2125, Augusta, Georgia 30903 by mail prior to filing this 17th day of September, 1993.

/s/ John P. Batson
John P. Batson
Ga. Bar No. 042150
Attorney for Appellant

Prepared by:

John P. Batson
303 Tenth Street
Augusta, Georgia 30901

706-722-8191

S93A0496

SUPREME COURT OF GEORGIA

ATLANTA SEP 20, 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

S.J.T., INC. d/b/a T J SMILES et al. v. RICHMOND COUNTY, GEORGIA et al.

It appearing that the order of September 9, 1993, vacating the supersedeas issued February 12, 1993, was improvidently issued since a stay of the remittitur pending application to the U.S. Supreme Court for review had issued, appellants' motion for reconsideration is granted, the order of September 9 is hereby vacated, and the order of February 12 reinstated nunc pro tunc. It is further ordered that prosecutions and proceedings based on citations issued to James Fenimore, and Laura Wilson on September 13, 1993, be stayed. Appellants' motion for contempt is denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchsomb, Deputy Clerk.

IN THE SUPREME COURT OF THE
STATE OF GEORGIA

S.J.T., INC. d/b/a T J SMILES, and JAMES FENIMORE, Plaintiffs-Appellants,	)	
v.	)	
RICHMOND COUNTY, GEORGIA, and CHARLES WEBSTER,	)	No. S93A0496
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that S.J.T. Inc., d/b/a T J Smiles, and James Fenimore, the appellants above-named, hereby appeal to the Supreme Court of the United States from the denial of a timely filed motion for rehearing of a June 14, 1993 order by the Supreme Court of the State of Georgia, entered in this action on July 15, 1993.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted this 8th day of October, 1993.

/s/ John P. Batson
John P. Batson
Georgia Bar No. 042150
Attorney for Appellants

Prepared by:

John P. Batson

303 Tenth Street
Augusta, GA 30901
(706) 722-8191

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

No. 93-584

In The

Supreme Court of the United States

October Term, 1993

S.J.T. INC., d/b/a T J SMILES,
and JAMES FENIMORE,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA,
and CHARLES WEBSTER, SHERIFF,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

HARRY D. REVELL
BURNSIDE, WALL, DANIEL AND ELLISON
454 Greene Street
P.O. Box 2125
Augusta, Georgia 30903
(706) 722-0768
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Should this Court review the ruling of the Georgia Supreme Court holding that Richmond County, Georgia's Nude Dancing Ordinance is constitutional?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Introduction and Statement of the Case 1

Argument and Citation of Authority 2

I. Under the Constitution of the United States, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises 2

II. Under the Constitution of the State of Georgia, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises 4

III. Richmond County's nude dancing ordinance is narrowly tailored to further the County's important or substantial governmental interests and is not subject to the deficiencies found in other legislation found to be unconstitutional 6

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Barnes v Glen Theater, Inc., 501 U.S. ___, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991) 2, 6

California v LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed. 2d 390 (1972) 3, 4

Gravely v. Bacon, 263 Ga. 203, 429 S.E. 2d 663 (1993) 6

Harris v Entertainment Systems, Inc., 259 Ga. 701, 386 S.E. 2d 140 (1989) 4, 5, 6, 7, 8, 9

Paramount Pictures Corporation v Busbee, 250 Ga. 252, 297 S.E. 2d 250 (1982) 4, 5, 6, 7

S.J.T., Inc. v Richmond County, 263 Ga. 267, 430 S.E. 2d 726 (1993) 8

U.S. v O'Brien, 391 U.S. 367, 885 S. Ct. 1673, 20 L.Ed. 2d 672 (1968) 2, 3, 6, 7

INTRODUCTION AND STATEMENT OF THE CASE

In their petition, Petitioners include a detailed description of the course of proceedings below. For the most part, the information provided is correct. However, there are several important points needing clarification. On page 5 Petitioners assert that they "had all necessary licenses by mid-1992, which placed no limit on presenting nude dancing in combination with the sale of alcohol." This statement is misleading. The liquor license obtained by Petitioners does not establish any vested right, contractual or otherwise, to operate a bar and offer nude dancing. In fact, at the time Petitioners obtained their liquor license, Richmond County's nude dancing ordinance was in full force and had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises.

Respondents strongly disagree with Petitioners' contention at page 9 that "the ordinance makes nude dancing illegal if and when the gross annual income from alcohol sales is twenty (20%) percent or more." The pertinent language of the ordinance is found in Section 2, Paragraph 3 and provides:

> . . . however that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater *which derives less than twenty (20%) percent of its gross annual income from the sale of alcohol beverages.* (Emphasis added).

This qualifying language is a further description and definition of mainstream performance houses, museums or theaters to which the ordinance does not apply. In no way does this language mean that any nude dancing bar

that derives less than twenty (20%) percent of its income is exempt from the ordinance. This point is developed further herein at page 8.

With the exceptions noted above, Respondents are satisfied with Petitioners' statement of the case and proceedings below. As is shown herein, Richmond County's nude dancing ordinance passes constitutional muster, and the opinion of the Georgia Supreme Court does not conflict with any decision of this Court.

ARGUMENT AND CITATION OF AUTHORITY

I. Under the Constitution of the United States, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises.

In *Barnes v Glen Theater, Inc.*, 501 U.S. ___, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991), this Court ruled that application of Indiana's public indecency statute to non-obscene nude dancing does not violate the First Amendment's Free Speech Clause. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, conceded that nude dancing is expressive conduct that is "marginally" within First Amendment protection. The Court then applied the four prong test for expressive conduct found in *U.S. v O'Brien*, 391 U.S. 367, 885 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Under *O'Brien*, a government regulation is sufficiently justified if: 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression;

and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien, supra* at 376-377. In applying Indiana's public indecency statute to the *O'Brien* test, this Court observed that even though there was no legislative history to show what governmental interest the Indiana legislature had in mind in enacting the statute, the history of similar enactments shows that they were aimed at protecting public order and morals. The Court found this interest to be substantial and that protecting it was within the constitutional power of government. Thus, the first two prongs of the *O'Brien* test were met. The Court then concluded that Indiana's interest in regulating nude dancing was unrelated to the suppression of free expression and that the statute's clothing requirement was narrowly tailored to achieve the state's purpose.

In *California v LaRue,* 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed. 2d 390 (1972), this Court upheld a California nude dancing statute substantially identical to Richmond County's ordinance approved below. In *LaRue,* the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. The State regulations were challenged, not in the context of censorship of a dramatic performance in a theater, but rather in the context of licensing bars and nightclubs to sell liquor by the drink. *LaRue,* 409 U.S. at 114. A three judge district court panel held that the California regulations were invalid under the First and Fourteenth Amendments. In reversing the district court, this Court observed:

> But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

409 U.S. at 118.

The decision rendered by the Supreme Court of Georgia in this case is completely consistent with these prior decisions of this Court.

II. Under the Constitution of the State of Georgia, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises.

The Supreme Court of Georgia has addressed the constitutionality of nude dancing ordinances in several recent decisions. In *Harris v Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E. 2d 140 (1989), the Court relied on a traditional First Amendment analysis to determine whether a state statute prohibiting nude dancing was a valid exercise of police power. In doing so, the Georgia Court re-affirmed the three part test set forth in *Paramount Pictures Corp. v Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). Under the *Paramount* test, a statute will be upheld even though it infringes upon protected expression: (1) if it furthers an important government interest; (2) if the government interest is unrelated to the suppression of

speech; and (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that interest.

The state statute involved in the *Harris* case contained no statement of the governmental interest sought to be achieved. However, the Court assumed that the important governmental interest was the prevention of otherwise illegal activity found to be associated with establishments offering nude dancing and alcohol. The Court further assumed that the statute in question furthered that governmental interest. Thus, the first two parts of the *Paramount* test were satisfied.

The statute under examination in *Harris* was struck down by the Georgia Supreme Court only after it failed the third prong of the *Paramount* test because the restrictions on free speech were determined to be greater than what was essential to further the important governmental interest. The Court noted that the explicit terms of the statute went well beyond prohibiting nude dancing in bars:

> This Act applies to a host of other establishments besides bars. For example, the Act would apply to so-called mainstream performance houses and museums, which need licenses to sell alcoholic beverages to their patrons for consumption on the premises. Appellants do not argue that the legislature found the combination of alcohol and the depictions of nudity an undesirable mix at these establishments or that it had even intended to proscribe the mix at museums, at the opera, or at mainstream performance and movie theaters. (Footnote omitted). With regard to bars, the Act, under any reasonable construction, would prevent a bar from turning a television set on where a soap opera or movie depicts simulated sexual intercourse, also proscribed by the Act. The Act goes

> well beyond the argued governmental interest and substantially infringes upon other protected expression. Therefore, the incidental restriction of expression is greater than is essential to the furtherance of the governmental interest and the Act must fall as an improper exercise of the State's police power.

259 Ga. 701, 703-704, 386 S.E. 2d 140, 142-143.

Through the *Harris* case, the Georgia Supreme Court recognized that narrowly tailored restrictions on nude dancing would survive a constitutional challenge. The Georgia Supreme Court did, in fact, approve the City of Smyrna's nude dancing ordinance just one month before approving the ordinance at issue in this case. See *Gravely v. Bacon*, 263 Ga. 904, 427 S.E. 2d 264 (1993). It is particularly noteworthy that the Georgia Supreme Court did not have the benefit of the more recent First Amendment analysis found in this Court's decision in *Barnes v Glen Theater, Inc., supra* when it decided *Harris*.

III. Richmond County's nude dancing ordinance is narrowly tailored to further the County's interests and is not subject to the deficiencies found in *Harris*.

Richmond County's ordinance, as amended, satisfies both the *O'Brien* test and the *Paramount* test in every respect. First, the important governmental interests sought to be achieved are clearly and specifically set forth in the preamble to the ordinance. These governmental interests are unrelated to the suppression of speech. Thus,

both the *O'Brien* and the *Paramount* threshold tests are easily met.

The restrictions contained in Richmond County's ordinance, as amended, are no greater than what is essential to further an important governmental interest, i.e. the prevention of nude, barroom dancing because of the illegal activity that often results at such establishments. The ordinance's restrictions on nudity and nude dancing are limited to premises licensed to sell, serve, or dispense alcoholic beverages for consumption on the premises. The restrictions apply only to *live* "adult" entertainment, not the showing of television programs. In response to the deficiency noted in *Harris*, the ordinance expressly excludes mainstream performance houses, museums, or theaters which derive less than twenty percent (20%) of their gross annual income from the sale of alcoholic beverages.

In their petition, petitioners argue that the "mainstream" exception referenced above and found in Section 2, paragraph 3 of the amended ordinance is the County's Achilles' heel. Petitioners devote a large portion of their petition advancing several theories on why the "mainstream" exception renders the ordinance unconstitutional. While these pages may well be full of entertaining reading and clever rhetorical questions, the arguments advanced were held by the Georgia Supreme Court to be insignificant and legally irrelevant. As previously stated, Richmond County's governmental interest furthered by the nude dancing ordinance is the prevention of the otherwise illegal activity found to be associated with bars offering nude dancing and alcohol. Richmond County has not found it necessary to proscribe the combination of

alcohol and brief depictions of nudity at "mainstream" performance houses such as the opera, museums, and movie theaters.

Apparently, Petitioners have difficulty understanding the exception found in Section 2, paragraph 3 of the amended ordinance, which is set forth below:

> . . . however, that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater *which derives less than twenty (20%) percent of its gross annual income from the sale of alcohol beverages.* (Emphasis added).

The plain and simple language emphasized above is clear evidence of Richmond County's concerted effort to narrowly tailor its ordinance to achieve the stated governmental purpose. The limiting language is used to further define mainstream performance houses, museums or theaters and is, at worst, surplusage. Even Petitioners must concede that "mainstream" performance houses derive the majority of their income from ticket sales or benevolent contributions, not alcohol sales.

The Supreme Court of Georgia has recognized that Petitioners' nude dancing bar could not be considered a mainstream performance establishment. *S.J.T., Inc. v Richmond County,* 263 Ga. 267, 270, 430 S.E. 2d 726, 730 (1993). (*See* also *Harris v Entertainment Systems,* 259 Ga. 701, 704 (1989), Fn. 2 where a similar nude dancing club, The Gold Club, did not purport to be a mainstream performance establishment.) Thus, the argument of Petitioners that they should be allowed a one year "grace period" to establish whether they derive less than twenty (20%)

percent of their annual income from alcohol sales is fallacious. The decision by Petitioners to rest their case on the exception found in Section 2, paragraph 3 of the ordinance is predictable but ill advised according to the Georgia Supreme Court.

As amended, Richmond County's ordinance clearly and specifically describes the activities prohibited or restricted and is free from and responsive to the deficiencies noted in the statute under review in the *Harris* case.

CONCLUSION

Richmond County's nude dancing ordinance is narrowly tailored to achieve its stated end and does not unnecessarily infringe on protected speech. The decision of the Georgia Supreme Court declaring the ordinance constitutional does not in any way conflict with any decision of this Court. As a result, the Petition for a Writ of Certiorari should be denied.

This 10th day of November, 1993.

HARRY D. REVELL
Georgia State Bar No. 601331
Attorney for Respondents

BURNSIDE, WALL, DANIEL
AND ELLISON
Post Office Box 2125
Augusta, Georgia 30903
(706) 722-0768

Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

No. 93-584

In The

Supreme Court of the United States

October Term, 1993

S.J.T. INC., d/b/a T J SMILES,
and JAMES FENIMORE,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA,
and CHARLES WEBSTER, SHERIFF,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF

JOHN P. BATSON
303 Tenth Street
Augusta, Georgia 30901
(706) 722-8191
Counsel for Petitioners

Please serve:

JOHN P. BATSON
303 Tenth Street
Augusta, Georgia 30901
Telephone: (706) 722-8191
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY BRIEF

The Respondents begin their Brief with a misleading, non-sequitur, that characterizes as non-existent Petitioners' liberty and property interests to offer nude dancing and sell alcohol. Respondents argue that "[t]he liquor license obtained by Petitioners does not establish any vested right, contractual or otherwise, to operate a bar and offer nude dancing." (Brief of Respondents at 1).

Even under Georgia law, the moment the Petitioner was granted a temporary license, the liberty and property interests created by the license to sell liquor vested.

> A liquor license is an entitlement to operate a business, a business upon which a person's livelihood is dependent. Furthermore, often, as in this case, substantial amounts of property are invested in the business that is dependent on the continuation of the license for its term.

Harris v. Entertainment Systems, Inc., 259 Ga. 701, 386 S.E.2d 140, 143 (Ga. 1989). This Court has recognized that licenses create interests which should be free from arbitrary state takings, as shown by the following:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'.

Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971).

Petitioners have a standing Constitutional right to present erotic entertainment, an interest which could be said to vest upon existence of Petitioners' intention to present the same. *See e.g., California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (non-obscene nude entertainment protected); *see also, Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504, 511 (1991).

The factual premise of the Respondents' introductory argument is false. The Respondents assert, "at the time Petitioners obtained their liquor license, Richmond County's nude dancing ordinance was in full force and had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises." (Brief of Respondents at 1). In fact, the Ordinances in question were not yet enacted when Petitioners applied for and purchased their first licenses in 1991. The Commissioners of Richmond County approved Petitioners' alcohol, beer, wine and dancing licenses on July 9, 1991,[1] and Petitioners purchased them on July 10, 1991, (Brief of Petitioners, App. 20-21, ¶ 11), fully two months before the September 10, 1991 ratification of Richmond County, Georgia Ordinance 91-15, and one year prior to the September 1, 1992 enactment of Ordinance 92-5. (Brief of Petitioners, App. 35). Petitioners' state license was effective on a temporary basis on August 16, 1991, and on a

---

[1] Although ¶ 11 in the Complaint, found in the Appendix of the Petition for Writ of Certiorari at 20, reads ". . . the Commissioners approved them on July 9, 1992 . . . ", the actual date of the County's first permanent approval was July 9, 1991. Plaintiff has sent a letter to the Chief Deputy Clerk of the United States Supreme Court explaining this error and correction.

permanent basis in October, 1991. (Brief of Petitioners, App. 21, ¶ 13). Both Richmond County and state licenses were renewed in 1992. (Brief of Petitioners, App. 21, ¶¶ 11-13).

Non-obscene dancing is protected, regardless of the subsequent passage of local ordinances like Richmond County's. Thus, Petitioners have both an ongoing right to perform and facilitate expressive nude dancing, and, through their alcohol licenses, a vested, protected interest in selling alcohol.

County Reads Ordinance to Ban Blue Collar Bar Nude Dancing, but Permit Theatrical Nude Dancing and Alcohol Consumption

Although the Respondents gloss over the Ordinance's arbitrary limitation of protected expressive activity based on an analysis of income from alcohol versus nonalcohol sources, their response brief makes their true intentions all too clear – an outright ban of nude dancing in blue collar bars, while sanctioning highbrow theatrical, nude dancing and alcohol consumption. They state that "Richmond County's nude dancing ordinance . . . had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises." (Brief of Respondents at 1). They interpret the Ordinance's action as the "prevention of nude, barroom dancing" or "*live* (italics original) 'adult' entertainment". (Brief of Respondent at 7). On the other hand, "Richmond County has not found it necessary to proscribe the combination of alcohol and brief depictions of nudity at 'mainstream' performance houses such as the opera, museums, and movie theaters." (Brief of Respondents 7-8). The State's highest

court, according to Respondents, has interpreted the ordinance to "serve the purpose of excluding establishments which do not derive most of their income from alcohol". (Petition for Certiorari, App. 7). The ordinance as interpreted by the County and the Georgia Supreme Court bans a broad spectrum of accepted blue collar entertainment.

Respondents argue that *Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) and *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972) are controlling. (Brief of Respondent at 2-4). However, Petitioners assert both are distinguishable and not controlling. Unlike the Richmond County Ordinance, the state statute in *Barnes* did not arbitrarily and completely eliminate a genre of expressive activity, but left intact the erotic message by permitting dancing with minimal covering. *California v. LaRue*, diverges from the case at bar because California has a statewide constitutional and statutorily-based regulatory framework which gives a single liquor board statewide control. The California liquor board has prohibited live sexual entertainment and films in bars, and other establishments, licensed to dispense liquor by the drink. In Georgia, however, the State's, and therefore the County's, police power to regulate alcohol is limited by the Georgia Constitution's lack of a "constitutional equivalent of the Twenty-First Amendment." *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140, 142 (Ga. 1989). The County can offer no similar constitutional or statutory framework of uniform, state-wide regulation.

CONCLUSION

Notwithstanding the ordinance's facially objective measure of permitted nude entertainment at certain types of establishments, based on the alcohol versus non-alcohol gross income comparison, the ordinance is given a subjective reading by the Georgia Supreme Court and the County which would eliminate a band of speech on elitist and arbitrary grounds. Given *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993), and the decision appealed from herein, the Georgia Supreme Court has misinterpreted *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 89 (1986) and read into Georgia and Federal constitutional law the authority of each local government to ban a broad spectrum of non-obscene entertainment, instead of regulating and guiding its availability.

Certiorari should be granted to rein in the arbitrary takings of protected interests under the guise of a misused secondary effects doctrine, and then to establish bounds for judicious use of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 89 (1986). The challenged ordinance is an example of a new and mutant strain of local law using an arbitrary and irrational means to establish obscenity *de jure* anew. The ordinance bans an erotic message in one setting, yet permits the same message in a refined setting. Such troublesome distinctions have no place in the law.

Respectfully submitted this 29th day of November, 1993.

JOHN P. BATSON
Ga. Bar No. 042150
303 Tenth Street
Augusta, GA 30901
(706) 722-8191
Attorney for Petitioners